No. 695

FILED
DEC 27 1947
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

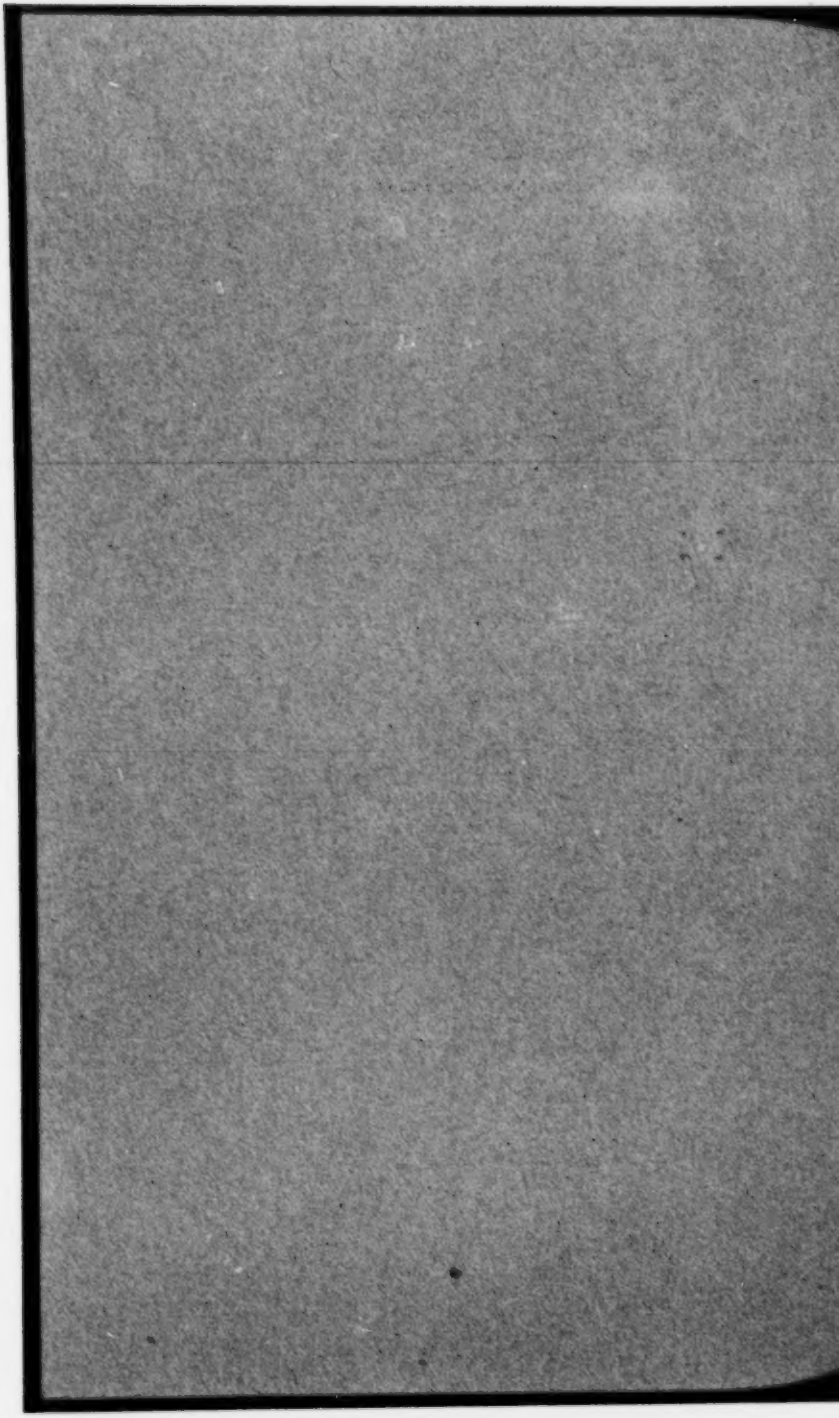
October Term, 1947

ROY D. KREBS,
as Receiver of Central Mutual Insurance Company
of Chicago, an Illinois corporation,
Petitioner,

vs.

CHARLES J. ROGERS, INC.,
a Michigan corporation,
Respondent.

PETITION AND WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN AND BRIEF IN SUPPORT THEREOF.



INDEX

PAGE NO.

Petition for Writ of Certiorari:

Summary Statement of the Matter Involved 2

Jurisdictional Statement 5

The Questions Presented 9

The Reasons Relied On for the Allowance of the Writ 10

Brief in Support of Petition for Certiorari:

The Opinion Below 14

Jurisdiction 14

The Questions Involved 14

Assignments of Error 15

Argument 18-62

A. Respondent is bound by the Illinois proceedings although not a party thereto or notified thereof 18-33

B. The Illinois Assessment against Respondent is entitled to Full Faith and Credit in the Courts of Michigan 33-40

C. 1. The one-year proviso of the Michigan Mutual Insurance Code is not a statute of limitations, does not apply to foreign insurance companies in liquidation and cannot constitutionally be applied to them 40-54

2. The doctrine of comity is irrelevant; no question of the public policy of Michigan is or could be involved 55-57

D. Petitioner is suing upon a judgment, not upon a contract, and the liability involved is statutory, not contractual 58-59

E. Michigan members of the Company should not be excepted from the obligation to pay assessments which the Courts have enforced against the members in other states 60

Conclusion 61-62

Appendix 63-65

AUTHORITIES CITED

TABLE OF CASES

	Page No.
Adam v. Saenger, 303 U. S. 59	19
Aetna Life Ins. Co. v. Dunken, 266 U. S. 389	7, 45, 62
Andrews v. Bacon, 38 Fed. 777	26
Baltic Mining Co. v. Massachusetts, 231 U. S. 68	51
Barbour v. Thomas, 86 Fed. (2nd) 510	26
Beha v. Weinstock, 247 N. Y. 221	33, 43, 44
Bernheimer v. Converse, 206 U. S. 516	7, 21, 22, 24, 35, 46
Bradford Electric Light Co. v. Clapper, 286 U. S. 145	50
Broderick v. Rosner, 294 U. S. 629	7, 23, 35, 37, 50, 51, 62
Campbell v. Holt, 115 U. S. 620	49
Casey v. Galli, 94 U. S. 673	26
Central Mutual Auto Ins. Co. v. Commissioner, 292 Mich. 309	43
Chandler v. Peketz, 297 U. S. 609	8, 21, 22, 35
Christmas v. Russell, 5 Wall. 290	7, 34, 37, 38, 39, 56
Christopher v. Brusselback, 302 U. S. 500	8, 20, 21, 22
Commonwealth v. Keystone Indemnity Exchange, 335 Pa. 333	28
Converse v. Hamilton, 224 U. S. 243	7, 22, 23, 24, 35
Cooper v. Reynolds, 10 Wall. 308	19
Dahnke-Walker Co. v. Bondurant, 257 U. S. 282	45
Davidson v. New Orleans, 96 U. S. 97	45
Davis v. Davis, 305 U. S. 32	8, 37, 38
Fauntleroy v. Lum, 210 U. S. 230	7, 19, 35, 37, 38, 39, 56, 57
Ferris v. American Insurance Union, 245 Mich. 548	27
Fidelity & Deposit Co. v. Tafoya, 270 U. S. 426	51
Gaston v. Keehn (Ga.), 26 S. E. (2nd) 107	60
Glenn v. Liggett, 135 U. S. 533	26, 47
Glenn v. Marbury, 145 U. S. 499	48
Grover & Baker Sewing Machine Co. v. Radcliffe, 137 U. S. 287	19
Guaranty Trust Co. v. York, 89 Law Ed. 1418	49
Hampton v. McConnell, 3 Wheat. 234	7, 34, 37, 38
Hansberry v. Lee, 311 U. S. 32	8, 20
Hartford Life Ins. Co. v. Barber, 245 U. S. 146	20
Hartford Life Insurance Co. v. Ibs, 237 U. S. 662	20
Hawkins v. Glenn, 131 U. S. 319	26, 46
Howarth v. Lombard, 175 Mass. 570	26
In Re Auto Mutual Indemnity Co., 14 N. Y. Supp. (2) 601	45
Jackson v. Citizens' Casualty Co., 252 N. Y. App. Div. 393	59
John Hancock Mutual Life Ins. Co. v. Yates, 299 U. S. 178	8, 50
Keehn v. Hodge Drive-It-Yourself, Inc., 146 Ohio St. 45	12, 33
Keehn v. Parrish Dray Line, 145 Fed. (2nd) 646	60
Kelch v. Keehn (Md.), 36 Atl. (2) 544	49
Kennedy v. Gibson, 8 Wall. 498	26
Kenney v. Supreme Lodge, 252 U. S. 411	7, 35, 37, 38, 39
Koshkonong v. Burton, 104 U. S. 668	48
Ludwig v. Stewart, 32 Mich. 27	48
Magnolia Petroleum Co. v. Hunt, 320 U. S. 430	8, 34, 36, 38, 62

	Page No.
Marin v. Augedahl, 247 U. S. 142	7, 21, 22, 35
McElmoyle v. Cohen, 13 Pet. 312	31
Miller v. Barnwell Bros., 137 Fed. (2nd) 257	60
Milliken v. Meyer, 311 U. S. 457	8, 19
Milwaukee County v. White Co., 296 U. S. 268	8, 35, 38, 56
Modern Woodmen of America v. Mixer, 267 U. S. 544	6, 7, 28, 35, 51, 61
Murray's Lessees v. Hoboken Land Co., 18 How. 272	45
Mutual Fire Ins. Co. v. Phoenix Furniture Co., 108 Mich. 170	27, 62
Parker v. Brown, 317 U. S. 341, 362	54
Pennoyer v. Neff, 95 U. S. 714	20
People ex rel. Palmer v. Central Mutual Ins. Co. of Chicago, 313 Ill. App. 84	3, 18, 29, 30, 42, 60
Pink v. A. A. A. Highway Express, Inc., 314 U. S. 201	8, 21, 36, 56, 62
Platt v. Wilmot, 193 U. S. 602	58
Roche v. McDonald, 275 U. S. 449	7, 19, 34, 39
Royal Arcanum v. Green, 237 U. S. 531	6, 20, 35
Selig v. Hamilton, 234 U. S. 652	7, 24, 35
Smith v. Swormstedt, 16 How. 288	20, 21
Southwestern Telegraph & Telephone Co. v. Danaher, 238 U. S. 482	45
Sovereign Camp v. Bolin, 305 U. S. 66	6, 8, 35, 59, 62
Supreme Tribe of Ben Hur v. Cauble, 255 U. S. 356	20
Swing v. American Glucose Co., 123 Ill. App. 156	29
Taggart v. Wachter, 179 Md. 608	28
Terral v. Burke Construction Co., 257 U. S. 529	51
Titus v. Wallick, 306 U. S. 282	8, 19, 35, 37, 38, 39, 50, 56, 57, 61
U. S. v. South-Eastern Underwriters Association, 322 U. S. 533	53, 54
Ward & Gow v. Krinsky, 259 U. S. 503	45
Wheeler v. Jackson, 137 U. S. 245	48
Whitney v. California, 274 U. S. 357	45
Williams v. North Carolina, 89 Law Ed. 1123	8, 55, 62
Williams v. North Carolina, 317 U. S. 287	8, 36, 38, 39

STATUTES AND CONSTITUTIONAL PROVISIONS

	Page No.
Constitution of the United States, Amendment XIV, Sec. 1	5, 11, 45
Constitution of the United States, Article I, Sec. 10	5, 11
Constitution of the United States, Article IV, Sec. 1	4, 5, 9, 14, 36, 37
Constitution of the United States, Article I, Sec. 8, Cl. 3	11-12, 17, 53-54
Act of Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 937, 28 U. S. C. 344	5, 7, 14
Act of May 26, 1790, c. 11, 28 U. S. C. 687	5, 10, 36, 38
Revised Statutes of Illinois (State Bar Assn. Ed. 1935) Ch. 73, Sec. 287, et seq.	2, 29-30
Revised Statutes of Illinois (State Bar Ass'n Ed. 1937), Ch. 73, Secs. 819 and 833	29-30
Revised Statutes of Illinois (State Bar Ass'n Ed. 1937), Ch. 83, Sec. 17	4
Compiled Laws of Michigan of 1929, Secs. 12654-12671	41
Compiled Laws of Michigan of 1929, Sec. 12660	4, 9, 14, 40
Compiled Laws of Michigan of 1929, Sec. 13531	6
Compiled Laws of Michigan of 1929, Sec. 13976	4, 41

TEXT BOOKS, ETC.

Ames, J. B., Lectures on Legal History	49
Henderson, The Position of the Foreign Corporation in Constitutional Law	51
Holmes, Hon. Oliver Wendell, Collected Legal Papers	61
Jackson, Hon. Robert H., Full Faith and Credit—The Lawyer's Clause of the Constitution, 45 Col. Law Rev. 1	34, 55
Willoughby, W. W., The Constitutional Law of the United States (2nd Ed.)	57

Supreme Court of the United States

OCTOBER TERM, 1945

No. .....

ROY D. KEEHN,
as Receiver of Central Mutual Insurance Company
of Chicago, an Illinois corporation,
PETITIONER,

VS.

CHARLES J. ROGERS, INC.,
a Michigan corporation,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN AND BRIEF IN SUPPORT THEREOF

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

(Figures in parentheses refer to pages of the printed record, except as the context indicates otherwise.)

To The Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Roy D. Keehn, as Receiver of Central Mutual Insurance Company of Chicago, an Illinois corporation, respectfully represents that:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED

This case presents the question of the right of a state, under the guise of merely regulating procedure, to nullify statutory obligations voluntarily assumed by its citizens as members of a corporation chartered in another state. The Supreme Court of Michigan, in an opinion filed and judgment entered on May 14, 1945 (rehearing denied October 8, 1945), has asserted this right; it has denied Full Faith and Credit to the public acts, records and judicial proceedings of the State of Illinois, and, in annihilating the substantive rights conferred upon Petitioner by the law of Illinois, has deprived Petitioner of his property without due process of law and has impaired the obligation of a statute-imposed contract between Respondent and an Illinois corporation.

The facts are simple and not in dispute. The Respondent corporation was and is admittedly a member of Central Mutual Insurance Company of Chicago by virtue of its acceptance of a policy of insurance in said Insurance Company (5). As required by the law of Illinois (Revised Stats. of Ill., State Bar Assn. Ed. 1935, Chapter 73, Sec. 287 et seq.), and by the By-Laws of the Company, the policy contained the following provision:

> "The contingent liability of the assured hereunder is limited to one time the premium named herein and no more. The assured is hereby given and accepts notice that by virtue of this policy he is a member of the Central Mutual Insurance Co. of Chicago" (3).

The policy which was issued for a term of one year, commencing on April 24, 1936, and ending on April 24, 1937, was cancelled by mutual consent on October 10, 1936 (4, 6). Central Mutual Insurance Company became in-

solvent and was taken over for liquidation by the Illinois Insurance authorities early in 1937. After extended litigation, in the Circuit Court of Cook County, Illinois, on March 19, 1940, an assessment of one time the cash premium was levied against all holders of policies in the Company who had held a policy at any time from January 31, 1935, to January 11, 1937, inclusive, and the Receiver was authorized to collect the same by suit, if necessary, or otherwise (9-12). An appeal was perfected from said order to the Appellate Court of Illinois, First District, which Court, on January 22, 1942, affirmed said order. *People ex rel. Palmer v. Central Mutual Insurance Co. of Chicago*, 313 Ill. App. 84.

By further order of the Illinois Court, on February 5, 1941, Assessment Roll No. 9 was ordered spread on record, levying an assessment against the policyholders therein named, including the Respondent corporation. The entry in question was as follows:

> Name of Policyholder: Charles J. Rogers, Inc.
> Number of Policy: X-114715
> Amount of Assessment: $6,116.16 (8-9).

Demand for payment of this assessment was addressed by Petitioner to the Respondent Corporation on April 11, 1941, and subsequently and the present action was instituted in the Circuit Court for Wayne County, Michigan, after payment was refused (6), on June 17, 1943. The cause was duly matured and came on for hearing, upon Petitioner's Motion for Summary Judgment, on April 14, 1944. Petitioner declared and relied upon a certified transcript of said assessment order of March 19, 1940, and upon said Assessment Roll No. 9. Respondent did not plead the Michigan Statute of Limitations. The only defense asserted was a clause in the Michigan Mutual Insurance Code, Sec-

tion 12660 Compiled Laws of Michigan, 1929, reading as follows:

> "If at any time the admitted assets are less than the reserve and other liabilities, the Company shall immediately collect upon policies with a contingent premium a sufficient proportionate part thereof to restore such assets, *provided no member shall be liable for any part of such contingent premium in excess of the amount demanded within one* (1) *year after the termination of the policy.*" (Emphasis added.)

In Petitioner's behalf it was argued that this statute did not apply to foreign insurance companies in liquidation and that it could not constitutionally be made to apply to them—that a construction of the Michigan statute with which it was admittedly impossible to comply was so arbitrary and unreasonable as to amount to a taking of property without due process of law and an impairment of the obligation of contract; also, that Petitioner was not demanding an assessment but was suing upon a valid Illinois judgment which was entitled to Full Faith and Credit under Article IV, Section 1 of the Federal Constitution; and that Petitioner was entitled to sue thereon at any time within ten years either under the Illinois statute of limitations (Revised Statutes of Ill. State Bar Assn. Ed. 1937 Ch. 83, Sec. 17) or under the Michigan Statute of Limitations (Sec. 13976(1) Compiled Laws of 1929).

The trial court upheld Petitioner's contentions and entered judgment in his favor on June 14, 1944, in the amount of $7,084.52 plus costs. On appeal to the Supreme Court of Michigan, where the same constitutional arguments were re-asserted, the judgment was vacated, without a new trial, on the ground that the action could not be maintained because demand for payment of the assessment was not made upon the Respondent corporation within one year after

the expiration of the policy. The Court held the Full Faith and Credit clause inapplicable and declared that "The rule of comity is not allowed to operate when it will contravene the rights of a citizen of the State where the action is brought." The Court's opinion is reported in 311 Mich. 416 and in 18 N.W. (2nd) 877.

II.

JURISDICTIONAL STATEMENT

Jurisdiction is invoked under the Act of February 13, 1925, c. 299, Sec. 1, 43 Stat. 937, Sec. 344 U.S.C. and Supreme Court Rule 38.

Petitioner is advised by counsel and believes that the judgment of the Supreme Court of Michigan violates Petitioner's Constitutional rights in the following respects:

> (a) It involves a refusal to accord full faith and credit to the public acts, records and judicial proceedings of the State of Illinois, contrary to Article IV, Section 1 of the Constitution of the United States, and the implementing Act of May 26, 1790, c. 11, 28 U.S.C. 687.
>
> (b) It involves an impairment of the obligation of contract contrary to Article I, Section 10 of the Constitution of the United States.
>
> (c) It involves a deprivation of property without due process of law contrary to Article XIV, Section 1 of the Amendments to the Constitution of the United States.

These Constitutional arguments were seasonably and repeatedly asserted in the courts below. In a brief filed in the trial court, counsel for Petitioner argued that:

> "Central Mutual Insurance Company of Chicago was organized under Illinois law and we contend

> that not only comity but the Full Faith and Credit clause of the Federal Constitution require that the judgment of the Illinois court above referred to be given the same effect in this State as it would have in Illinois," citing *Modern Woodmen of America v. Mixer*, 267 U. S. 544; *Royal Arcanum v. Green*, 237 U. S. 531, and *Sovereign Camp of Woodmen of the World v. Bolin*, 305 U. S. 66.

The trial court, observing the judicial tradition that Constitutional issues will be determined only when necessary to a decision, treated the question as one of Conflict of Laws and for the reasons stated in his opinion (14-17) applied the law of Illinois. He cited, *inter alia*, the decisions of this Court referred to in the preceding paragraph.

In the Supreme Court of Michigan, Petitioner's rights under the Full Faith and Credit clause were asserted in the required Statement of Questions Involved (20) and were elaborately briefed.

This Constitutional question was ignored by opposing counsel, and was lightly, not to say casually, touched upon by the Court in its opinion (26). On motion for rehearing, Petitioner vigorously re-asserted the denial of Full Faith and Credit (29-32) and added that the judgment of the Court had impaired the obligation of the contract and had deprived Petitioner of a valuable property right without due process of law. All these contentions were rejected by the Court without opinion (33). Oral argument of the Constitutional questions, though specifically requested (32), was denied despite the Michigan statute providing that "Parties to proceedings pending in the Supreme Court shall be entitled to oral hearing in all calendar causes and upon all motions involving constitutional questions and personal liberty." C. L. 1929, Sec. 13531.

In these circumstances, Petitioner requests review under the Federal statute above cited which reads, in part, as follows:

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had, where is drawn in question * * * the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution * * *."

The decisions of this Court which are believed to sustain jurisdiction to review the ruling of the Supreme Court of Michigan are as follows:

Hampton v. McConnell (1818), 3 Wheat 234;

Christmas v. Russell (1866), 5 Wall 290;

Bernheimer v. Converse (1906), 206 U.S. 516;

Fauntleroy v. Lum (1910), 210 U.S. 230;

Converse v. Hamilton (1911), 224 U.S. 243;

Selig v. Hamilton (1913), 234 U.S. 652;

Marin v. Augedahl (1917), 247 U.S. 142;

Kenney v. Supreme Lodge (1919), 252 U.S. 411;

Aetna Life Ins. Co. v. Dunken (1924), 266 U.S. 389;

Modern Woodmen of America v. Mixer (1925), 267 U.S. 544;

Roche v. McDonald (1927), 275 U.S. 449;

Broderick v. Rosner (1935), 294 U.S. 629;

Milwaukee County v. White Company (1935), 296 U.S. 268;

Chandler v. Peketz (1936), 297 U.S. 609;

John Hancock Mutual Life Ins. Co. v. Yates (1936), 299 U.S. 178;

Christopher v. Brusselback (1937), 302 U.S. 500;

Davis v. Davis (1938), 305 U.S. 32;

Sovereign Camp v. Bolin (1938), 305 U.S. 66;

Titus v. Wallick (1938), 306 U.S. 282;

Hansberry v. Lee (1940), 311 U.S. 32;

Milliken v. Meyer (1940), 311 U.S. 457;

Pink v. A.A.A. Highway Express, Inc. (1941), 314 U.S. 201;

Williams v. North Carolina (1942), 317 U.S. 287;

Magnolia Petroleum Co. v. Hunt (1943), 320 U.S. 430;

Williams v. North Carolina (1945), 89 Law Ed. 1123.

More specifically, Petitioner relies upon the pronouncement of this Court in *Titus v. Wallick, supra*, that

> "Where a state court refuses credit to the judgment of a sister state because of its opinion of the nature of the cause of action or the judgment in which it is merged, an asserted federal right is denied and the sufficiency of the grounds of denial are for this court to decide."

To the same effect is *Magnolia Petroleum Co. v. Hunt, supra*, at P. 443.

III.

THE QUESTIONS PRESENTED

The questions presented are as follows:

1. May Sec. 12660 of the Compiled Laws of Michigan of 1929 be applied, without violation of the Constitutional guaranties of due process of law and against impairment of the obligation of contract, to assessments levied in judicial proceedings in Illinois for the liquidation of an insolvent Illinois mutual insurance company?

2. Does not Article IV, Section 1 of the Constitution of the United States require the Michigan courts to give Full Faith and Credit to the Illinois judgment against Respondent?

3. May the Michigan courts constitutionally treat membership in a foreign mutual insurance company as though the obligations thereby created were merely those of a Michigan contract?

4. May the State of Michigan nullify statutory obligations, consistent with morality, voluntarily assumed by citizens of Michigan as members of a mutual insurance company chartered in another state?

5. May the Michigan courts, in an action upon an Illinois judgment, disregard the Michigan statute of limitations providing that actions upon foreign judgments may be brought at any time within ten years after the rendition thereof and defeat Petitioner's recovery by substituting therefor a one year proviso of the Michigan Mutual Insurance Code, compliance with which is and has always been admittedly impossible?

IV.

THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

A writ of certiorari should be granted for the following reasons:

1. The decision of the Supreme Court of Michigan is in conflict with every decision of this Court construing the Full Faith and Credit clause and the implementing Act of May 26, 1790, c. 11, 28 U.S.C. 687.

2. The Respondent corporation admits membership in Central Mutual Insurance Company of Chicago. It makes no claim that the Illinois judgment is void or irregular or tainted with fraud or that the Court lacked jurisdiction to render such judgment. There would admittedly be no defense to an action on the judgment in Illinois. It is not claimed and there is not the slightest reason to suppose that the result of the proceedings in Illinois would have been any different had Respondent been personally served with process therein instead of having the corporation and other policyholders "stand in judgment for it" as permitted by the decisions of this Court. No question of the public policy of Michigan is or could legitimately be raised. The case involves a money judgment entered in a civil suit and does not involve penal obligations, revenue laws or personal status. It, therefore, does not fall within any of the few recognized exceptions to the requirement of Full Faith and Credit.

3. Although the *construction* of a Michigan statute by the Supreme Court of Michigan is final, the construction adopted in the present case, namely that it applies to foreign corporations in liquidation, is arbitrary and unreasonable in that it imposes a condition with which it is admittedly impossible to comply and involves a deprivation of Petitioner's property without due process of law in contraven-

tion of the Fourteenth Amendment and an impairment of the obligation of contract contrary to Article I, Section 10 of the Federal Constitution.

4. Under the decisions of this Court the liability in question is essentially statutory, not contractual, and the Supreme Court of Michigan was not at liberty to treat membership in Central Mutual Insurance Company of Chicago as a mere contract to be construed and enforced in accordance with the law of Michigan. Whether Petitioner relies upon the Illinois statute as a "public act" or upon Assessment Roll No. 9 confirmed by the Illinois court as a "record" or upon the assessment order of the Circuit Court of Cook County as a "judicial proceeding," the Constitution exacts Full Faith and Credit. Entry into membership in an incorporated society is more than a contract; it is entering into a complex and abiding relation and the rights and obligations of membership are governed by the law of the state of incorporation.

5. Petitioner is entitled to enforce the Illinois judgment by action thereon within ten years, under the applicable statutes either of Illinois or of Michigan, and the refusal of the Supreme Court of Michigan to apply either statute is arbitrary and unreasonable and amounts to deprivation of Petitioner's property without due process of law and an impairment of the obligation of contract.

6. Policyholders of Central Mutual Insurance Company of Chicago residing in numerous states and in the District of Columbia, have been required by the courts thereof to pay the assessments adjudged to be due Petitioner by the Illinois Court. It is unfair to the creditors of Central Mutual Insurance Company of Chicago and to the thousands of policyholders who have already paid these assessments, and it interferes with an orderly and equitable liquidation of the Company's affairs and unreasonably burdens and

obstructs interstate commerce, to permit Michigan policyholders to evade their liability.

7. The Supreme Court of Michigan has ignored the fact that Petitioner's original claim has been merged in a judgment which is entitled to Full Faith and Credit and has erroneously scrutinized Petitioner's claim as though it were being asserted for the first time. The decisions of this Court establish that in a suit upon a money judgment for a civil cause of action the validity of the claim upon which it was founded is *res judicata* and not open to inquiry, whatever its genesis. Moreover, the Court in reaching this indefensible result, has improperly had recourse to information *dehors* the record, namely, an insurance policy neither pleaded nor proved in the trial court, thus departing from the accepted and usual course of judicial proceedings.

8. Many of the States of the United States in which Central Mutual Insurance Company of Chicago did business have by statute imposed conditions precedent to the assessment of mutual insurance company members similar to the one-year proviso upon which Respondent relies in the case at bar. Such statutes exist in Missouri, in Ohio, in Maryland and in Kansas. In Ohio, the question in the case at bar has recently been decided by a divided Court. *Keehn, Receiver v. Hodge Drive-It-Yourself, Inc.*, 146 Ohio St. 45. Similar controversies are pending in other states. It will clarify the situation and obviate the necessity of much further litigation for this Court now to determine, with finality, the power of the States to nullify statutory obligations voluntarily assumed by their citizens as members of mutual insurance companies chartered in other states.

WHEREFORE, Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the Supreme Court of Michigan, to the

end that said cause may be reviewed and determined by this Court, as provided by law; that the judgment of the Supreme Court of Michigan be reversed and the judgment of the Circuit Court be reinstated; and that Petitioner may have such other and further relief in the premises as to the Court may seem appropriate and just.

Roy D. Keehn,
As Receiver of Central Mutual Insurance Company of Chicago,

By Cleveland Thurber,
Emmett E. Eagan,
Edgar H. Ailes,
Charles F. Hough,
Ira W. Hurley,
Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I.

THE OPINION BELOW

The opinion of the Supreme Court of Michigan is reported in 311 Michigan Reports 416 and in 18 Northwestern Reporter (2nd) 877.

II.

JURISDICTION

Jurisdiction is invoked and certiorari is prayed under the Act of February 13, 1925, C. 229, Sec. 1, 43 Stat. 937, Sec. 344 U.S.C. and Supreme Court Rule 38. Reference is made to the Jurisdictional Statement, supra, pp. 5-8.

III.

THE QUESTIONS INVOLVED

1. May Sec. 12660 of the Compiled Laws of Michigan of 1929 be applied, without violation of the Constitutional guaranties of due process of law and against impairment of the obligation of contract to assessments levied in judicial proceedings in Illinois for the liquidation of an insolvent Illinois mutual insurance company?

2. Does not Article IV, Section 1 of the Constitution of the United States require the Michigan courts to give Full Faith and Credit to the Illinois judgment against the Respondent?

3. May the Michigan courts constitutionally treat membership in a foreign mutual insurance company as though

the obligations thereby created were merely those of a Michigan contract?

4. May the State of Michigan nullify statutory obligations, consistent with morality, voluntarily assumed by citizens of Michigan as members of a mutual insurance company chartered in another state?

5. May the Michigan courts, in an action upon an Illinois judgment, disregard the Michigan statute of limitations providing that actions upon foreign judgments may be brought at any time within 10 years after the rendition thereof and defeat Petitioner's recovery by substituting for that statute a one-year proviso in the Michigan Mutual Insurance Code, compliance with which is and has always been admittedly impossible.

IV.

ASSIGNMENTS OF ERROR

1. The Supreme Court of Michigan erred in reversing the judgment of the Circuit Court and in entering a final judgment in favor of Respondent.

2. The Supreme Court of Michigan erred in denying Petitioner's Motion for Rehearing and in denying oral argument upon the Constitutional questions involved.

3. The Supreme Court of Michigan erred in failing to give Full Faith and Credit to the Illinois assessment against Respondent whether the liability be deemed to stem from a Public Act, a Record, or a Judicial Proceeding of the State of Illinois.

4. The Supreme Court of Michigan erred in depriving Petitioner and the other members of Central Mutual Insurance Company of Chicago of their property—the statute-imposed right to assess—without due process of law.

5. The Supreme Court of Michigan erred in impairing the obligation of a statute-imposed contract between Respondent, the Company and all the other members of Central Mutual Insurance Company of Chicago.

6. The Supreme Court of Michigan erred in treating membership in a foreign mutual insurance company as though the obligations thereby created were merely those of a Michigan contract to be construed and enforced according to the law of the forum.

7. The Supreme Court of Michigan erred in nullifying a statutory obligation, consistent with morality, voluntarily assumed by a citizen of Michigan as a member of an Illinois corporation.

8. The Supreme Court of Michigan erred in arbitrarily and unreasonably refusing to apply to Petitioner's cause of action the 10-year Michigan statute of limitations and in applying thereto a one-year proviso in the Michigan Mutual Insurance Code, compliance with which is and has always been admittedly impossible.

9. The Supreme Court of Michigan erred in holding, in effect, that Michigan may exact of a foreign mutual insurance company, as the price of doing business in Michigan, the abrogation of all contracts for assessment, upon which contracts operations on the mutual plan necessarily depend.

10. The Supreme Court of Michigan erred in treating the question involved as one of comity and in holding itself free on grounds of public policy to disregard substantive statutory rights lawfully acquired by Petitioner in Illinois.

11. The Supreme Court of Michigan erred in departing from the accepted and usual course of judicial proceedings by considering a document which was neither pleaded

nor proved but which reached the court, in correspondence with opposing counsel, *pendente lite.*

12. The Supreme Court of Michigan erred in that, under the guise of regulating the remedy, it has interfered in the internal affairs of a foreign corporation, unreasonably burdened and obstructed interstate commerce, frustrated the orderly liquidation of a foreign corporation and destroyed the statute-imposed mutuality between the members of such corporation.

ARGUMENT

A.

RESPONDENT IS BOUND BY THE ILLINOIS PROCEEDINGS ALTHOUGH NOT A PARTY THERETO OR NOTIFIED THEREOF

We commence with the basic fact that the Courts of the State of Illinois, in a time-honored proceeding of unchallenged validity, have determined (a) that Central Mutual Insurance Company of Chicago, an Illinois corporation, was insolvent; (b) that an assessment of its policyholders was necessary in order to meet the Company's obligations; and (c) that an assessment of 100% of the premium named in the policy be levied upon all persons who held policies in said Company at any time between January 31, 1935 and January 11, 1937. *People ex rel Palmer v. Central Mutual Insurance Company of Chicago*, 313 Ill. App. 84.

The second basic fact is that the Respondent Charles J. Rogers, Inc., a Michigan corporation, was admittedly a policyholder of Central Mutual Insurance Company from April 24, 1936 to October 10, 1936 (5-6, 13).

The Respondent not only admits membership in this mutual insurance company and possession of a policy conspicuously setting forth the contingent liability of members; it makes no attack whatever upon the Illinois proceedings. One vainly scans Respondent's Plea (5-6), Affidavit of Merits (13), Assignments of Error (2) and Statement of Questions Involved (19-20), for any suggestion that the Illinois judgment is erroneous or void or that it suffers from fraud, irregularity or any other infirmity. The Supreme Court of Michigan seem equally disinclined to attack the Illinois judgment (26). Surely, the invalidity of the Illinois Court's decree will not be presumed. On such a record, we feel entitled to rely upon this Court's declara-

tion of the law in *Milliken v. Meyer* (1940), 311 U. S. 457, 462:

> "Where a judgment rendered in one state is challenged in another, a want of jurisdiction over either the person or the subject matter is of course open to inquiry. *Grover & Baker Sewing Machine Co. v. Radcliffe*, 137 U. S. 287; *Adam v. Saenger*, 303 U. S. 59. But if the judgment on its face appears to be a record of a court of general jurisdiction, such jurisdiction over the cause and the parties is to be presumed unless disproved by extrinsic evidence or by the record itself. *Adam v. Saenger, supra*, at p. 62. In such case, the full faith and credit clause of the Constitution precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the judgment is based. *Fauntleroy v. Lum*, 210 U. S. 230; *Roche v. McDonald*, 275 U. S. 449; *Titus v. Wallick*, 306 U. S. 282. Whatever mistakes of law may underlie the judgment (*Cooper v. Reynolds*, 10 Wall. 308), it is 'conclusive as to all the *media concludendi*'. *Fauntleroy v. Lum, supra*, at p. 237."

Since the jurisdiction of the Illinois court in the present case is not challenged, it may be thought a work of supererogation on our part to substantiate it. We do so, however, because we are convinced that, despite our best efforts, neither opposing counsel nor the Supreme Court of Michigan have grasped the point that a valid judgement, entitled to Full Faith and Credit, may be granted in the circumstances of this case even though the Respondent was not personally before the Illinois Court. Thus, opposing counsel plead (5) that Respondent was not a party to the Illinois suit nor served with process therein and the Supreme Court of Michigan remark that (27) "Neither the action of the Illinois Court nor the levy by the receiver adjudicated the individual liability of this defendant for an assessment." The theory seems to be that

the court is bound to recognize only judgments *in personam* which meet the classical test of *Pennoyer v. Neff* (1877), 95 U. S. 714.

It is hardly necessary to say to this Court that such is not the law. It has not been the law for at least half a century. We shall not attempt to improve upon the following resume of the law in *Hansberry v. Lee* (1940), 311 U. S. 32:

> "It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. *Pennoyer v. Neff*, 95 U. S. 714. Freeman on Judgments (5th Ed.), Sec. 407. A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and Statute of the United States, R. S. Sec. 905, 28 U. S. C. Sec. 687, prescribe * * *
>
> "To these general rules there is a recognized exception that, to an extent not precisely defined by judicial opinion, the judgment in a 'class' or 'representative' suit, to which some members of the class are parties may bind members of the class or those represented who were not made parties to it. *Smith v. Swormstedt*, 16 How. 288; *Royal Arcanum v. Green*, 237 U. S. 531; *Hartford Life Ins. Co. v. Ibs*, 237 U. S. 662; *Hartford Life Ins. Co. v. Barber*, 245 U. S. 146; *Supreme Tribe of Ben Hur v. Cauble*, 255 U. S. 356; cf. *Christopher v. Brusselback*, 302 U. S. 500. * * *
>
> "It is a familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present, * * * or where the interest of the members of the class, some of whom are present as parties, is joint, or where for any other reason the rela-

tionship between the parties present and those who are absent, is such as legally to entitle the former to stand in judgment for the latter. *Smith v. Swormstedt, supra;* cf. *Christopher v. Brusselback, supra,* 503, 504 and cases cited.

"In all such cases, so far as it can be said that the members of the class who are present are, by generally recognized rules of law, entitled to stand in judgment for those who are not, we may assume for present purposes that such procedure affords a protection to those parties who are represented, though absent, which would satisfy the requirements of due process and full faith and credit. See *Bernheimer v. Converse,* 206 U. S. 516, *Marin v. Augedahl,* 247 U. S. 142; *Chandler v. Peketz,* 297 U. S. 609."

In making the foregoing remarks, this Court was, of course, not charting a new course or declaring a novel or unorthodox rule of liability. It merely adhered to its previous decisions. From these, and from several outstanding opinions of state courts, we select only those most germane to the case at bar:

In delivering the unanimous opinion of this Court in *Pink v. A. A. A. Highway Express, Inc.* (1940), 314 U. S. 201, the Chief Justice said:

"It is a familiar rule that those who become stockholders in a corporation subject themselves to liability for assessment when made in conformity to the statutes of the State of its organization although they are not made parties to the proceeding for levying it (citing many cases). Whether we support these legal consequences by reference to consent of the stockholder or to his assumption of a corporate relationship subject to the regulating power of the State of incorporation, in either case the procedure conforms to accepted principles, involves no want of due process and is entitled to full faith and credit so far as the necessity and amount of the as-

sessment is concerned. See *Christopher v. Brusselback*, 302 U. S. 500, and cases cited. *The like principle has been consistently applied to mutual insurance associations where the fact that the policyholders were members was not contested.*" (Italic ours.)

In *Christopher v. Brusselback* (1938), 302 U. S. 500, 503, this Court declared that:

> "Where a procedure is authorized by statute under which a corporation may be brought into court for determination of its insolvency and the amount to be assessed against stockholders for the payment of its debts and the judgment is declared by statute to be binding upon them, they are deemed, by virtue of their membership in the corporation, to have so far subjected themselves to the prescribed procedure and its consequences as to be bound by the determination although not nominal parties to the proceeding. * * * Whether it be said that by purchasing or retaining his stock in the face of such a procedure the stockholder has consented that the corporation represent him for the purposes of the adjudication. *Bernheimer v. Converse, supra*, 529, 532, 533; *Marin v. Augedahl, supra*, 150, or, more realistically, that as stockholder he has voluntarily assumed a corporate relationship which is subject to the local regulatory power, in the exercise of which the procedure has been attached, as an incident, to his membership in the corporation, *Converse v. Hamilton, supra*, 260, in either case the procedure conforms to accepted principles, involves no want of due process; *Converse v. Hamilton, supra; Selig v. Hamilton, supra; Chandler v. Peketz, supra*, and, at least when it ripens into a judgment, is entitled to full faith and credit. *Marin v. Augedahl, supra.* It is enough that in every case the stockholder has assumed or retained his membership in the corporation after the warning of the statute, or of rules governing the corporation, of which he knew or had opportunity to know and that the benefits of mem-

bership carry with them the risk that the corporation may stand in judgment for him."

The *Brusselback* case was clearly foreshadowed by this Court's decision in *Broderick v. Rosner* (1935), 294 U. S. 629, wherein the Superintendent of Banks of New York sued in New Jersey to enforce a stockholders' assessment levied by him against residents of New Jersey. The assessment was attacked for the reason, among others, that it was not made in judicial proceedings resulting in a judgment *in personam* but was levied *ex parte* by an administrative officer. In rejecting this defense and holding that New Jersey must enforce the New York assessment, Mr. Justice Brandeis said:

> "The fact that the assessment here in question was made under statutory direction by an administrative officer does not preclude the application of the full faith and credit clause. If the assessment had been made in a liquidation proceeding conducted by a court, New Jersey would have been obliged to enforce it, although the stockholders sued had not been made parties to the proceedings, and, being non-residents, could not have been personally served with process. *Converse v. Hamilton,* 224 U. S. 243, 252, 260. The reason why in that case the full faith and credit clause was held to require Wisconsin courts to enforce the assessment made in Minnesota was not because the determination was embodied in a judgment. Against the non-resident stockholders there had been no judgment in Minnesota. Wisconsin was required to enforce the Minnesota assesment because statutes are 'public acts' within the meaning of the clause, and because the residents of Wisconsin had, by becoming stockholders of a Minnesota corporation submitted themselves to that extent to the jurisdiction and laws of the latter State."

Most of these assessment cases refer back to *Selig v. Hamilton* (1913) 234 U. S. 652, to *Converse v. Hamilton* (1911), 224 U. S. 243 and to *Bernheimer v. Converse* (1906) 206 U. S. 516. We select *Converse v. Hamilton* as the one most relevant to the case at bar. The receiver of an insolvent Minnesota corporation sued residents of Wisconsin to enforce a shareholders' liability which had been established against them in liquidation proceedings in Minnesota. Neither of the stockholders was a party to the Minnesota insolvency proceedings nor was he personally served with notice of the levy of the assessments. In behalf of the stockholders it was argued, *precisely as in the case at bar*, that the Minnesota proceedings were not binding upon non-residents without notice; that the Minnesota statutes could have no extraterritorial force; that the Minnesota receiver could sue only by comity; and that such suits should not be allowed when they jeopardized the interests of citizens of Wisconsin. The Supreme Court of Wisconsin adopted these arguments and sustained demurrers to the complaints. Reversing the decision, this Court said:

> "(1) The statute is but a reasonable regulation of the mode and means of enforcing the double liability assumed by those who become stockholders in a Minnesota corporation. (2) While the order levying the assessment is made conclusive, as against all stockholders, of all matters relating to the amount and propriety of the assessment and the necessity therefor, he against whom it is sought to be enforced is not precluded from showing that he is not a stockholder, or is not the holder of as many shares as is alleged, or has a claim against the corporation which in law or in equity he is entitled to set off against the assessment, or has any other defense peculiar to himself, and (3) while the order is made conclusive as against a stockholder, even though he may not have been a party to the suit in which it was made, and may not have been notified that an

assessment was contemplated, this is not a tenable objection for the order is not in the nature of a personal judgment against the stockholder and as to him is amply sustained by the presence in that suit of the corporation considering his relation to it and his contractual obligation in respect of its debts * * *.

"In the cases now before us, the Supreme Court of Wisconsin failed to give full faith and credit to those laws and to the proceedings thereunder upon which the receiver's right to sue was grounded. It is true that an ordinary chancery receiver is a mere arm of the court appointing him, is invested with no estate in the property committed to his charge and is clothed with no power to exercise his official duties in other jurisdictions. But here, the receiver is not merely an ordinary chancery receiver, but much more. By the proceedings in the sequestration suit, had conformably to the laws of Minnesota, he became a quasi-assignee and representative of the creditors, was invested with their rights of action against the stockholders and was charged with the enforcement of those rights in the courts of that state and elsewhere * * *. The receiver's right to maintain the actions in that court was denied in the belief that it turned upon a question of comity only, unaffected by the full faith and credit clause of the Constitution of the United States * * *.

"The subject to which Chapter 272 (the Minnesota Statute) is addressed is peculiarly within the regulatory power of the State of Minnesota; *so much so that no other state can properly be said to have any public policy thereon. And what the law of Wisconsin may be respecting the relative rights and obligations of creditors and stockholders of corporations of its creation and the mode and means of enforcing them, is apart from the question under consideration.*" (Emphasis added.)

Guided by earlier decisions of the Federal courts (e. g. *Glenn v. Liggett* (1890), 135 U. S. 533; *Hawkins v. Glenn*, (1888), 131 U. S. 319; *Andrews v. Bacon* (1889), 38 Fed. 777) the state courts readily evolved the same doctrine. In *Howarth v. Lombard* (1899), 175 Mass. 570, 56 N. E. 888, an exceptionally distinguished court (Holmes, Knowlton, Morton, Lathrop and Hammond, JJ.) with no suggestion of trail-blazing, upheld assessments against absent shareholders without notice of the proceedings, saying, at p. 577:

> "The members of such corporations as well as the corporations themselves are within the jurisdiction of the local court so far as is necessary for the determination of the rights and liabilities of the corporation and its members among themselves. In reference to this kind of liability, such decisions and orders are binding on stockholders who are not before the court otherwise than by virtue of their membership in the corporation. * * * That such adjudications are binding upon absent stockholders in reference to assessments for unpaid subscriptions has often been expressly decided."

In support of its conclusion, the Supreme Judicial Court of Massachusetts alluded to the universally approved practice of assessing, without notice or opportunity to be heard, members of insolvent mutual fire insurance companies, and also to the settled rule that shareholders in national banks may, without notice or hearing, be subjected to assessment by Comptroller of the Currency. The Court cited *Kennedy v. Gibson* (1869), 8 Wall. 498, 505 and *Casey v. Galli* (1876), 94 U. S. 673, to which may appropriately be added *Barbour v. Thomas* (1937), 86 Fed. (2nd) 510, cert. den. 300 U. S. 670, in which the 9,000 shareholders of the Detroit Bankers Company were compelled to pay an assessment of $25,000,000.00 levied by the Comptroller of the Currency despite a proffer of substantial evidence (since amply confirmed) that the Bank was perfectly solvent.

Even in Michigan, at one time, these principles were deemed to be incontrovertible. In *Mutual Fire Insurance Co. v. Phoenix Furniture Co.* (1895), 108 Mich. 170, a much cited decision, the receiver of an Illinois mutual insurance company sued to collect an assesment upon the notes of Michigan members. In holding the Illinois assessment conclusive, the court said:

> "This was an Illinois contract. These notes were *choses in action*, were first in possession of the company in Illinois, were turned over by it to the receiver and were under the direct control of the Illinois court. That court entered a decree, upon evidence placed before it, determining the amount of assets and debts and the amount of the assessment necessary to liquidate its liabilities. If every stockholder may now contest this decree, the difficulty thus thrown in the way of an orderly and practical settlement of the affairs of the insolvent corporation is apparent. Different courts might adopt different rulings upon the amount of the assessment. We think the better doctrine is that each stockholder or member of the corporation is an integral part thereof and that such decree is binding and conclusive upon him. * * * Judgments and decrees cannot be attacked collaterally because they include items which courts, other than those by whom they were rendered, might hold to be illegal."

As recently as 1929 the Court decided *Ferris v. American Insurance Union*, 254 Mich. 548, from the syllabus of which we quote as follows:

> "Under the full faith and credit provision of the United States Constitution, a beneficiary certificate issued by a fraternal beneficiary society organized in Ohio to a citizen of Michigan is governed by the laws of the society valid in Ohio and such laws may not be adjudged unreasonable and void in Michigan."

To which Justice Wiest, citing this Court's opinion in *Modern Woodmen of American v. Mixer, supra,* added: "We must remember that the Society is a non-profit one and members sustain a mutual relation, make their own laws and all are bound thereby if valid under the laws of the domicile of the Society. Any other holding would destroy mutuality, favor some beneficiaries over others and abolish uniform rights and remedies."

The most valuable discussion of the problem in the state courts in recent years arose from the failure of the Keystone Indemnity Exchange, a Pennsylvania mutual company. In *Commonwealth ex rel Schnader v. Keystone Indemnity Exchange,* (1939) 335 Pa. 333, 6 A. (2nd) 821, the Supreme Court of Pennsylvania upheld assessments levied upon the members pursuant to the law of Pennsylvania, *notwithstanding the fact that the policies were by their terms declared to be non-assessable.* Thereupon the Pennsylvania insurance commissioner sued to recover the assessment due from a policyholder in Maryland, *Taggart v. Wachter* (1941) 179 Md. 608, 21 A (2nd) 141, and obtained a judgment based upon the Full Faith and Credit clause. The Supreme Court of Maryland, at p. 639, said:

> "A subscriber in a foreign jurisdiction, we conclude, is bound by that determination even though not directly a party to the proceeding in which the assessment is made because the assessment would not be practically possible if all subscribers, even those beyond the reach of service of process, need be made direct parties. It would be quite impossible for the courts of many jurisdictions to determine, each for itself, the amount of money required to be raised upon subscriptions or premium notes to satisfy the debts of the corporation; a just distribution of the burden of indebtedness can be secured only by an administration of the corporate affairs in the courts of the state which created the corporation. Under this rule, everyone has his day in court.

> He is not personally bound by the adjudication of the foreign tribunal; it is still open to him to show that he was not a policyholder, that he had paid in full, that he had been released, that he had a set-off. But the order of the foreign court is to be taken as conclusive as to the fact that an assessment is necessary, as to the amount of money required to be raised by the assessment, and as to the *pro rata* of each policy."

With this panoply of authority before us, let us turn again to the proceedings in Illinois in which Respondent's assessment liability was fixed. Reference to the official report (313 Ill. App. 84) indicates that the fact of insolvency, the necessity of an assessment, the amount thereof were all the subject of vigorous, able contest (313 Ill. App. 84, 91-92) not only by the Company "standing in judgment" for its members, but also by a policyholder who was permitted to intervene. After the assessment levy of March 19, 1940 had been made, the Receiver filed in court eleven separate assessment rolls, in the ninth of which, filed February 5, 1941, appears the name of Respondent, the number of its policy and the amount of its assessment (9). The procedure conformed in every respect to the decision in the leading case of *Swing v. American Glucose Co.* (1905) 123 Ill. App. 156, which held that a decree in a suit to liquidate a mutual insurance company, making an assessment upon members of the company, if binding upon the resident members, is likewise binding upon the non-resident members. And the court in that case pointed out the absurdity of a rule that would deny to a *court* a power to bind absent policyholders which could admittedly be exercised by a board of directors.

The proceedings were instituted under and conducted pursuant to the statutes of the State of Illinois.

These statutes are set out in the Appendix, *infra*, pp. 63 et seq. Summarizing them, we may say that the Act under which Central Mutual Insurance Company of Chicago was organized provided (1) that every policyholder *shall* be a member of the Company; (2) that the by-laws *shall* provide for contingent liability of members in an amount not less than the premium expressed in the policy; (3) that the policy *shall* plainly state the contingent liability; (4) that assessments *shall* be levied against the members in proportion to their respective liabilities to make up any deficiency of assets. Although it was contended (see 313 Ill. App. 84, 91) that the Receiver had no authority to levy assessments either under the Illinois Liquidation Act of 1925 (Ill. Rev. Stat. 1935, Ch. 73, Sections 105(1)-105(14) or under the Illinois Insurance Code, effective July 1, 1937 (Ill. Rev. Stat. 1937, Ch. 73, Sec. 819) which superseded the old Liquidation Act, the Illinois Court found ample authority for the levy, stating (313 Ill. App. 84, 105) that,

> "The salient fact that policyholders have contingent liabilities, contractual in their nature, assumed by them when they became members, fixed by statute, by-laws and policies, which constitute assets of the company to be collected in the course of liquidation, underlies the various theories upon which the courts have upheld assessments, whether levied by the directors of insurance, receivers or liquidators, under the court's direction. Being assets which pass to the receiver, he is delegated to deal with them 'in his own name as receiver or in the name of such company, as the court may by order direct, and as such receiver (he) shall be vested by operation of law with title to all of the property, contracts and rights of action * * * as of the date of the order so directing liquidation' (par. 498, ch. 73, Ill. Rev. Stat. 1935). Because of these circumstances, the levy of an assessment on policyholders

> is nothing more nor less than the exercise, by the receiver, of contractual rights vested in him by the liquidation decree, and amounts to no more than a demand for payment of the contingent liability which they assumed; and the levy is, in essence, a demand by the receiver of the assets in liquidation, title to which was vested in him, for payment of this liability. The mere fact that the power and duty of levying assessments is lodged by statute in the board of directors, and not in the receiver, should not defeat the levy when application is made to a court of equity for the necessary relief, because the directors failed to act. 'He was, in fact, the corporation itself for all the purposes of winding up its affairs.' "

This unchallenged, unreversed decision of the Illinois Appellate Court that the trial court *did* have full power and authority to authorize and to ratify and approve these specific assessments, is certainly now immune to collateral attack and is entitled to Full Faith and Credit.

In the light of such a record, it is hardly accurate for the Michigan court to declare (27) that "neither the action of the Illinois court nor the levy by the receiver adjudicated the individual liability of this defendant for an assessment, or the amount of such liability if it be determined." If, by such a statement, the Michigan court means that the Illinois proceedings do not deprive the Respondent of such personal defenses as non-membership, payment, release, set-off and the like, it is platitudinous; if, on the other hand, the court means that Michigan is free to scrutinize the original cause of action as though no assessment had ever been levied comformably to the laws of Illinois, it defies every pertinent adjudication of this Court.

It seems to us profitless to marshal the authorities as to whether the Illinois proceeding was a "class" or a "representative" suit; as to whether it resulted in a judgment *in rem* or *in personam;* as to whether the Respondent is bound thereby because of its consent given in advance, or for some other reason; and as to whether the basis for Full Faith and Credit is a Public Act, a Record or a Judicial Proceeding of the State of Illinois. Suffice it to say that, under the rulings of this Court, whatever theoretical basis of liability be adopted, there can be no defense to an action of this sort except want of jurisdiction, fraud in obtaining the judgment, non-membership, payment, release, set-off or other personal defenses—none of which is asserted in the case at bar. The findings of insolvency, of the necessity of assessment and of the amount thereof may not be impugned; otherwise, the orderly liquidation of a mutual insurance company would be an impossibility.

It cannot fairly be maintained that this one-year proviso in the Michigan Mutual Insurance Code should be added to the above-mentioned defenses which are peculiar and personal to each policyholder. Of course, a *true* statute of limitations, *if it meets the Constitutional test of affording a reasonable opportunity for suit,* may be applied by a state to an action upon a judgment rendered in another state. *McElmoyle vs. Cohen* (1839) 13 Pet. 312. That is undisputed. But this Michigan insurance proviso is not really a statute of limitations at all; it is, in essence, a provision relating to the internal affairs of corporations and purporting to regulate the liabilities of the corporation and its members *inter se.* Neither its phraseology nor its place in the Michigan statute books suggests that this proviso is a true statute of limitations. It lays down conditions under which members may be assessed, conditions under which companies may operate on the mutual plan.

Though the right of Michigan to dictate impossible conditions to corporations of its own creation may be conceded, it is clear that Michigan has no such right in respect of foreign corporations. The questions of Full Faith and Credit and of due process are thus interwoven in this case: if, as we contend, Michigan has failed to give Full Faith and Credit to the Illinois statute, Assessment Roll and Judicial Proceedings, i. e. the effect they would have if Respondent had been sued in Illinois, that is the end of Respondent's case; if, on the other hand, it can be maintained that Michigan has given Full Faith and Credit to the Illinois statute, Assessment Roll and Judicial Proceedings, and has merely allowed a personal defense peculiar to this policyholder, it must then be determined whether the allowance of such a defense is compatible with due process of law. We contend that it is not, for the reasons developed in this brief, *infra*, pp. 45-54.

That the Michigan insurance proviso cannot be regarded as a personal defense peculiar to the policyholder is also shown by the following consideration: If it *were* such a defense (e.g. non-membership, payment, release) it would of course be equally available to Respondent in the courts of any state in which it might be sued. Now it will not be pretended that this Michigan proviso would be recognized if Respondent had been sued in Illinois or, indeed, in any other state except Michigan. A contrary view would present a strange recrudescence of the "loi personelle" of the middle ages under which residents of a state were deemed to carry its law, as a protective mantle, wherever they went. No such theory is asserted by opposing counsel. The Supreme Court of Michigan appears to recognize that this proviso would avail the Rogers Company nothing if it were suable in Illinois (22). This fact, in itself, is enough to engender grave suspicions as to the soundness of the Court's result.

The foregoing considerations urgently exact attention in the light of a decision of the Supreme Court of Ohio, rendered November 21, 1945, which has just reached us. In *Keehn, Receiver v. Hodge Drive-It-Yourself, Inc.*, 146 Ohio St. 45, the court held, two of the justices dissenting, that the one-year proviso of the Ohio Insurance Code (similar to the proviso in the case at bar) was a "defense personal to himself" which an Ohio policyholder could rely upon to escape liability to the Illinois receiver. The court held, as we contend, that the one-year proviso "is not a statute of limitations but it imposes compliance with a condition precedent to the exercise of a given right" of assessment. So far as the opinion of the Ohio court discloses, no question of due process of law, impairment of the obligation of contract or undue interference with interstate commerce was raised in that case. Nevertheless, there is a powerful dissent arguing, as a matter of justice and common sense (buttressed by the New York case of *Beha v. Weinstock*, upon which we rely, *infra*, pp. 43-44) that the statute can properly be applied only to the assessment of members of going concerns and concluding that "The applicable statute of limitations, if available, could undoubtedly be invoked by a defendant in an Ohio proceeding to collect an assessment levied by an order of court in another state, but we insist that the one-year period, mentioned in Section 9607-16 General Code, is without relevancy here."

B.

THE ILLINOIS ASSESSMENT AGAINST RESPONDENT IS ENTITLED TO FULL FAITH AND CREDIT IN THE COURTS OF MICHIGAN

We submit that the Full Faith and Credit Clause requires the Supreme Court of Michigan to give effect to the Illinois assessment against the Respondent. Though it be con-

ceded, as Mr. Justice Jackson has recently suggested (45 Columbia Law Review, p. 12) that "decisional law" is entitled to Full Faith and Credit as well as Statutes, Petitioner does not need to rely upon that doctrine. He can and does rely upon the Illinois Statute to which the Respondent has voluntarily subjected itself and upon Assessment Roll No. 9 filed in the Circuit Court of Cook County, Illinois, and confirmed by that court, which Assessment Roll is surely a "record" within the meaning of the Constitution.

It is not often, in dealing with Constitutional problems, that the vicissitudes of history and the sway of conflicting interests permit a court to chart a line of decisions as consistent, as coherent and as cogent as are the decisions of this Court construing the Full Faith and Credit Clause. From the epigrammatic terseness of Chief Justice Marshall's opinion (paraphrasing the language of the Act of 1790) in *Hampton* v. *McConnell* down to the magisterial analyses of a century of precedent in *Magnolia Petroleum Company* v. *Hunt*, we have an unbroken series of remarkable decisions, decisions which must be reckoned among the chief unifying factors in the history of the United States. The cases are, of course, all well-known to this Court and need not be here discussed at length. We review briefly a few of the cases which we vainly pressed upon the Supreme Court of Michigan and which we regard, collectively, as decisive of the case at bar.

In *Christmas* v. *Russell* (1866) 5 Wall. 290, this Court held it a denial of Full Faith and Credit for the State of Mississippi to refuse enforcement of a Kentucky judgment on the ground that, had the original action been commenced in Mississippi, it would have been barred by the local statute of limitations. To the same effect is *Roche* v. *McDonald* (1927) 275 U. S. 449.

In *Bernheimer* v. *Converse*, *Converse* v. *Hamilton* and *Selig* v. *Hamilton*, all previously cited, this Court upheld assessments made in the state which chartered a corporation as against non-resident shareholders who were not parties to the proceeding. To the same effect are *Marin v. Augedahl* (1917) 247 U. S. 142 and *Chandler* v. *Peketz*, (1936) 297 U. S. 609.

From *Fauntleroy* v. *Lum* (1910) 210 U. S. 230; from *Kenny* v. *Supreme Lodge* (1919) 252 U. S. 411; from *Milwaukee County* v. *White Company* (1935) 296 U. S. 268, and from *Titus* v. *Wallick* (1938) 306 U. S. 282, we learn that when a "foreign cause of action" has been reduced to judgment, another state may not decline to enforce that judgment because its courts would have (justifiably) refused to entertain the original cause of action.

The "fraternal benefit" cases of *Royal Arcanum* v. *Green* (1915) 237 U. S. 531, *Modern Woodmen of America* v. *Mixer* (1925) 267 U. S. 544, 551 and *Sovereign Camp* v. *Bolin* (1938) 305 U. S. 66 speak decisively to the effect that,

> "Entry into membership in an incorporated society is more than a contract; it is entering into a complex and abiding relation and the rights of membership are governed by the law of the state of incorporation. Another state, wherein the certificate of membership was issued, cannot attach to membership rights against the society which are refused by the law of the domicile."

Broderick v. Rosner (1935) 294 U. S. 629 seems to dispose finally of the view that a state which is hostile to a foreign judgment can frustrate or circumvent its enforcement by the adoption of a particular rule of jurisdiction, procedure or practice. The opinion of Mr. Justice Brandeis in that case is assuredly one of his most notable contributions to the law and it is so full of apt comments upon the

problems now before the Court that we urge its most serious consideration.

Pink v. *A.A.A. Highway Express Inc.* (1941) 314 U. S. 201 removes all doubts, if any ever existed, as to the applicability, to members of mutual insurance companies, of the settled doctrine of this Court in respect of assessments against corporate shareholders.

We come finally to *Magnolia Petroleum Company* v. *Hunt* (1943) 320 U. S. 430 and to the cognate cases of *Williams* v. *North Carolina*. For present purposes, we need attach no importance to the sharp differences of opinion among the members of this Court in respect of those decisions; as *decisions*, they manifestly do not govern the case at bar. We refer to them because of the invaluable history of the Full Faith and Credit clause which they afford and also because of the many acute and suggestive comments of the Justices—all of which, as it seems to us, support our present position. We have excerpted, as especially pertinent to the question now before the Court, certain portions of the opinions.

In *Williams* v. *North Carolina* (I) 317 U. S. 287, 293-5, a majority of the Court spoke as follows:

> "Article IV, Section 1, of the Constitution not only directs that 'Full Faith and Credit shall be given in each state to the public Acts, Records and Judical Proceedings of every other State' but also provides that 'Congress may by general laws prescribe the manner in which such Acts, Records and Proceedings shall be proved and the effect thereof.' Congress has exercised that power. By the Act of May 26, 1790, C. 11, 28 U. S. C. 687, Congress has provided that judgments shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken. Chief

Justice Marshall stated in *Hampton* v. *McConnell*, 3 Wheat. 234, 235, that 'the judgment of a state court should have the same credit, validity and effect, in every other court in the United States which it had in the state where it was pronounced, and that whatever pleas would be good to a suit thereon in such state, and none others, could be pleaded in any other court in the United States.' That view has survived substantially intact. *Fauntleroy* v. *Lum*, 210 U. S. 230. This Court has only recently stated that Art. IV, Section 1, and the Act of May 26, 1790, require 'not some, but full' faith and credit be given judgments of a state court. *Davis* v. *Davis* 305 U. S. 32, 40. Thus, even though the cause of action could not be entertained in the state of the forum, either because it had been barred by the local statute of limitations, or contravened the local policy, the judgment thereon obtained in a sister state is entitled to full faith and credit. See *Christmas v. Russell*, 5 Wall. 290; *Fauntleroy v. Lum, supra; Kenney* v. *Supreme Lodge*, 252 U. S. 411; *Titus* v. *Wallick*, 306 U. S. 282, 291. Some exceptions have been engrafted upon the rule laid down by Chief Justice Marshall. But, as stated by Mr. Justice Brandeis in *Broderick* v. *Rosner*, 294 U. S. 629, 642, 'the room left for the play of conflicting policies is a narrow one.' So far as *judgments* are concerned, the decisions, as distinguished from dicta, show that the actual exceptions have been few and far between, apart from *Haddock* v. *Haddock*. For this Court has been reluctant to admit exceptions in case of *judgments* rendered by the Courts of a sister state since the 'very purpose' of Article IV, Section 1 was 'to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judical proceedings of the others, and to make them integral parts of a single nation.' "

In *Magnolia Petroleum Company* v. *Hunt*, the Chief Justice, speaking for a majority of the Court, said:

> "Congress has provided that judgments 'shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken.' Act of May 26, 1790, C. 11, 1 Stat. 122, as amended, 28 U. S. C. Sec. 687.
>
> "From the beginning, this Court has held that these provisions have made that which was adjudicated in one state res judicata to the same extent in every other. *Hampton* v. *McConnell*, 3 Wheat. 234, 235; *Christmas* v. *Russell*, 5 Wall. 290; *Fauntleroy* v. *Lum*, 210 U. S. 230; *Kenney* v. *Supreme Lodge*, 252 U. S. 411; *Milwaukee County* v. *White Co.* 296 U. S. 268; *Davis* v. *Davis*, 305 U. S. 32, 40; *Titus* v. *Wallick*, 306 U. S. 282, 291-292; *Williams* v. *North Carolina*, 317 U. S. 287, 294-295. Even though we assume for present purposes that the command of the Constitution and the statute is not all-embracing, and that there may be exceptional cases in which the judgment of the state may not override the laws and policy of another, this Court is the final arbiter of the extent of the exceptions. * * * And, as we pointed out in *Williams* v. *North Carolina*, *supra*, 294-295, 'the actual exceptions have been few and far between. * * *'
>
> "We are aware of no such exception in the case of a money judgment in a civil suit. Nor are we aware of any considerations of local policy or law which could rightly be deemed to impair the force and effect which the full faith and credit clause and the Act of Congress require to be given to such a judgment outside the State of the rendition. *Milwaukee County* v. *White Co.*, *supra*, 277, 278.
>
> "The constitutional command requires a state to enforce a judgment of a sister state for its taxes, *Milwaukee County vs. White Co.*, *supra*, or for a

gambling debt, *Fauntleroy* v. *Lum*, *supra*, or for damages for wrongful death, *Kenney* v. *Supreme Lodge*, *supra*, although the suit in which the judgment was obtained could not have been maintained under the laws and policy of the forum to which the judgment is brought. It compels enforcement of a judgment in that forum even though a suit upon the original cause of action was barred there by limitations before the judgment was procured, *Christmas* v. *Russell*, *supra*; *Roche* v. *McDonald*, 275 U. S. 449. It demands recognition of it even though the statute on which the judgment was founded need not be applied in the state of the forum because it conflicts with the laws and policy of that state. *Kenney* v. *Supreme Lodge*, *supra*; *Titus* v. *Wallick*, *supra*; *Williams* v. *North Carolina*, *supra*.

"These consequences flow from the clear purpose of the full faith and credit clause to establish throughout the federal system the salutary principle of the common law that a litigation once pursued to judgment shall be as conclusive of the rights of the parties in every other court as in that where the judgment was rendered, so that a cause of action merged in a judgment in one state is likewise merged in every other. The full faith and credit clause like the commerce clause thus became a nationally unifying force. It altered the status of the several states as independent foreign sovereignties, each free to ignore rights and obligations created under the laws or established by the judicial proceedings of the others, by making each an integral part of a single nation, in which rights judically established in any part are given nation-wide application."

We conclude that since the case at bar presents a money judgment entered in a civil suit not involving penal obligations, revenue laws or domestic relations and not involving any subject in respect of which the State of Michigan "can

properly be said to have any public policy," the Supreme Court of Michigan has disregarded the Constitutional mandate and denied Full Faith and Credit.

C.

THE ONE-YEAR PROVISO OF THE MICHIGAN MUTUAL INSURANCE CODE IS NOT A STATUTE OF LIMITATIONS, DOES NOT APPLY TO FOREIGN INSURANCE COMPANIES IN LIQUIDATION AND CANNOT CONSTITUTIONALLY BE APPLIED TO THEM

Having shown that the Illinois assessment against Respondent is not vulnerable for any of the reasons commonly assigned in attacking such liabilities, we turn to an examination of the *ratio decidendi* in so far as it is disclosed by the opinion of the Supreme Court of Michigan. The reasons for disregarding the Illinois assessment appear to be two, viz:

(1.) That the action is barred by the one-year proviso in the Michigan Mutual Insurance Code, sec. 12660 C. L. 1929, and, furthermore

(2.) That the action will not be entertained on grounds of comity because it contravenes the interests of a resident of Michigan.

We shall deal with these points in order.

1. No one, of course, disputes the general rule that the applicable statute of limitations is that of the court invoked, the *lex fori*. The curious thing is the way in which the Supreme Court of Michigan goes about the task of applying this rule. The normal statute of limitations in respect of personal actions in Michigan is six years. C. L. 1929, sec. 13976 provides that,

> "*All* actions in any of the courts of this state shall be commenced within six (6) years next *after the causes of action shall accrue* * * *." (Emphasis supplied.)

And the statute further provides that,

> "Actions founded upon judgments or decrees rendered in any court of record of the United States, or of this state, or of some other of the United States * * * may be brought at any time within ten (10) years from the time of the rendition of such judgment. * * *"

Since the application of either of these statutes would have meant a judgment for Petitioner, the court supports its conclusion by invoking a clause from the Michigan Mutual Insurance Code. Now, in the first place, there is nothing in this Code (C. L. 1929, Secs. 12654-12671) suggesting any legislative intent to control the assessment of policyholders in foreign corporations and it would be interpretation *vi et armis* to attribute any such intent to the legislature. The Act plainly governs Michigan companies except for Sec. 12669 which states specifically the requirements of a foreign company seeking to do business in this state. Moreover, it is legally incompetent for a state to attempt regulation of the internal affairs of a foreign corporation. The statement of the Supreme Court of Michigan that the Act applies equally to foreign and to domestic companies (24) states a conclusion rather than a convincing reason and ignores the vital question in this case, namely the *power* of a state thus to tamper with lawful statutory obligations, consistent with morality, voluntarily assumed by its citizens as members of a foreign corporation.

We can discover no intention on the part of the Michigan legislature to impose upon foreign mutual insurance companies, when such companies are in liquidation, the

impossible requirement that assessments be levied within one year after the termination of a policy. It is perverse to attribute to a legislature which has recognized and, indeed, required the right of assessment in respect of Michigan companies an intention to nullify that right and to thwart its enforcement. In calling the requirement "impossible" we speak advisedly. This Court is familiar with the ordinary course of a mutual insurance company liquidation. The first thing to determine is whether the company is insolvent and this is usually the subject of a bitter and protracted contest. The result depends upon the valuation of an immense number of assets, the allowance of an immense number of claims and months of actuarial work. Central Mutual Insurance Company of Chicago, for example, did business in sixteen states and in the District of Columbia. It wrote over 100,000 policies of automobile insurance and there were 2,644 claims filed with the receiver. (See 313 Ill. App. 84, 88, 89.) A gigantic task of appraisal and accounting confronted the receiver even without considering the prolonged litigation which culminated in the assessment order of March 19, 1940. Even that was not final, for an appeal was taken to the Appellate Court of Illinois where a final decision was not obtained until January, 1942. Under the strange construction of the Michigan Statute adopted by the Supreme Court of Michigan, the receiver, in order to realize anything upon the assessments, which are the principal assets of the receivership estate, would have had to commence thousands of actions to recover assessments while the question of the company's solvency was still before the Illinois court. The cost of doing this would have been prohibitive, even if the procedure were otherwise justified. In short, whatever may be true of assessments levied by the board of directors of a going concern in the liquidation of an insolvent mutual insurance company, it is a physical impossibility to demand an assessment within one year after the expiration of every

policy. The Supreme Court of Michigan concedes this. (See 292 Mich. 309, 315-316.)

Now, it may be that if, in dealing with a Michigan insurance company, the Michigan court chooses, contrary to reason and to the weight of authority, to adopt a statutory interpretation which admittedly prevents an insolvent company from realizing anything upon its assets, the remedy is a problem for the Michigan legislature. But when a Michigan court thus seeks to hamstring a foreign insurance company and to paralyze and frustrate its liquidation, a Federal question is presented. One may justly assume that a court which did not wish to defeat assessments would hesitate long before reaching such a strange result and would at least state its reasons for ignoring the diametrically opposite conclusion of the New York Court of Appeals.

This precise question came before the New York Court (Cardozo, Crane, Andrews, Pound, Lehman, Kellogg and O'Brien, JJ.) in 1928 in *Beha v. Weinstock*, 247 N.Y. 221. The New York Mutual Insurance Law contains the following provision:

> "Every member shall be liable to pay and shall pay his proportionate part of any assessment which may be laid by the corporation in accordance with law and his contract, covering any deficiency (excess of liabilities over admitted assets) if he is notified of such assessment within one year after the expiration or cancellation of his policy."

In a unanimous opinion, the Court said:

> "The Attorney-General insists that the one year's notice does not apply to liquidation proceedings and we are inclined to agree with him for the following reasons: This was a mutual insurance company in which the insured was also an insurer. The only funds to pay insurance losses came from the

premiums or assessments. * * * The defendant knew, when he entered the mutual company, that assessments could be levied up to twice his premium for the purpose of paying the losses. The law so provided; so did his policy. The company, as a going concern, could estimate from day to day its apparent contingent liabilities for losses which had occurred and make from time to time the assessments necessary to meet those losses. Under such circumstances, it was reasonable that the company should notify the policyholder as soon as possible and at least within the year provided by the statute. A different situation confronted the liquidator. All losses and liabilities were fixed as of a certain date. He would have to gather in all available assets, ascertain all the losses up to that time and figure out the assessments upon policyholders. He would not only have one company to deal with, but as a State Department would in all probability have many proceedings going at the same time. No new business would be taken, of course, after the liquidator took possession. All liability and assets would be fixed in amount as of the date stated. The liabilities of the policyholders could not be increased by the taking on of any new business. It would, therefore, be of little importance whether the policyholder, liable to assessment to pay the debts, received notice at once or within the year or later, in the course of the proper administration of the Insurance Department liquidations. The main thing is that the debts and liabilities are fixed as of a certain date and a policyholder made liable by the statute for these debts up to a certain amount.

"The winding up of a corporation, such as a mutual insurance company, takes time, and it can hardly be expected that the legislature intended to force the Insurance Department to proceed to collect the assets within a definite period. I can see no reason for so limiting its powers."

To the same effect is *In Re Auto Mutual Indemnity Company* (1939) 14 N. Y. Supp. (2) 601.

We have demonstrated, we believe, that neither reason nor authority supports the construction of the Michigan statute which the court has adopted.

In the *construction* of Michigan statutes, of course, the Supreme Court of Michigan has the last word; the function of this Court "is confined to determining whether, as so construed and as applied to the concrete facts of the case, the statute contravenes the limitations imposed by the 14th Amendment upon state action." *Ward & Gow v. Krinsky* (1921) 259 U. S. 503, 510. It is the task of this Court "to determine whether the application made of the statute in this instance was so arbitrary as to contravene the fundamental principles of justice which the Constitutional guaranty of due process of law is intended to preserve." *Southwestern Telegraph & Telephone Co. v. Danaher* (1914) 238 N. S. 482, 489.

We shall assume then that the Michigan statute has been correctly construed by the Michigan court. It follows that Petitioner's Constitutional rights have been denied. It has long been settled that it is not due process of law to make a person's legal rights dependent upon compliance with impossible conditions; neither a legislature nor a court can by its fiat make *any* process due process of law. Cf. *Murray's Lessee v. Hoboken Land Co.* (1855), 18 How. 272 and *Davidson v. New Orleans* (1877) 96 U. S. 97. Nor can it be questioned that a statute, even if not void upon its face, may be unconstitutional as applied. See *Dahnke Walker Co. v. Bondurant* (1921) 257 U. S. 282, 289; *Whitney v. California* (1926) 274 U. S. 357, 378; *Aetna Life Insurance Co. vs. Dunken* (1924) 266 U. S. 389, 393.

The State of Michigan does not have absolute power in respect of procedure. The one-year statute as applied in

the case at bar, is just as unfair and absurd as a 24-hour statute of limitations would be and we cannot imagine any court upholding that. The basic principle is that parties must be given a fair and reasonable opportunity to assert the substantive rights which a state is bound to recognize. Recognition of the Illinois right is a farce when it is coupled with a condition which annihilates the right before it is born.

We submit that Petitioner had no cause of action upon which he could sue or upon which the Michigan statutes could possibly operate until Respondent failed to pay as required by the order of the Illinois court, confirming Assessment Roll No. 9, on February 5, 1941. To declare, as does the Supreme Court of Michigan, that this right was lost by failure to assert it before it ever existed is to reveal the untenability of the Court's position, a position to which it adhered despite our citation of *Bernheimer v. Converse*, 206 U. S. 516. In that case, this Court had to consider the effect, in an action in New York upon a Minnesota assessment, of a New York Statute requiring actions against stockholders to be brought within two years after they ceased to be stockholders. The Court said:

> "We do not think the provision of the statute relied upon covers these cases. It evidently refers to domestic corporations provided for in reference to the stockholders' liability created by the preceding sections of the same chapter. *The cause of action did not accrue until the receiver could sue upon the assessment after the stockholder had failed to pay as required by the order of the Minnesota Court of December* 22, 1902." (Emphasis added.)

The same considerations determined the case of *Hawkins v. Glenn* (1888), 131 U.S. 319, 333, wherein this Court quoted as follows from its earlier decision in *Scovill v. Thayer*:

> "There was no obligation resting on the stockholder to pay at all until some authorized demand in behalf of creditors was made for payment. The defendant owed the creditors nothing and he owed the company nothing save such unpaid portion of his stock as might be necessary to satisfy the claims of the creditors. Upon the bankruptcy of the company, his obligation was to pay to the assignees, upon demand, such an amount upon his unpaid stock as would be sufficient, with the other assets of the company, to pay its debts. He was under no obligation to pay any more and he was under no obligation to pay anything until the amount necessary for him to pay was at least approximately ascertained. Until then his obligation to pay did not become complete."

To which the Court, rejecting the defense of limitation, significantly added (p. 334):

> "And as between the stockholder and the corporation it does not lie in the mouth of the stockholder to say, in response to an attempt to collect his subscription for the payment of creditors, that the claim is barred because the company did not discharge its corporate duty in respect to its creditors earlier."

To the same effect is *Glenn v. Liggett* (1890), 135 U.S. 533, 548, wherein an action was brought in Missouri by Glenn, as trustee of a Virginia corporation, to recover from a resident of Missouri his unpaid stockholders' liability. Liggett defended, *inter alia*, on the ground that the action was barred by a Missouri statute of limitations. In rejecting this defense, this Court said:

> "The rights of the parties in the present case must be adjudicated according to the requirements of the statutes and jurisprudence of Virginia, which State created the corporation and in reference to whose laws the contracts of the subscribers to stock were made. The legislation of Missouri, which is invoked to the effect that, for the purposes of the statute of

limitations of that State, the liability of a stockholder in a corporation to a creditor becomes fixed by the insolvency and dissolution of the corporation and then becomes a primary and unconditional obligation and the statute commences to run at once, can have no application to the present case. Nor can the adjudication of a court of Virginia, in a suit properly brought, and where it had jurisdiction as to subject matter and parties, be reviewed or impeached in a collateral suit like the present, except for actual fraud."

Cf. *Glenn v. Marbury* (1891), 145 U.S. 499, 507.

But surely, it may be objected, Michigan cannot be compelled indefinitely to keep its courts open to demands originating in other states? Obviously not; but if Michigan is *really* to enforce the substantive right conferred by the law of Illinois upon Petitioner it must afford a fair and reasonable opportunity to assert the right. *The Supreme Court of Michigan would afford no opportunity at all.* The liquidation of a large insurance company is, as we have seen, an intricate, time-consuming business. This is a reality of which the courts should take account and of which they must take account if statutes are not to be nullified and valuable property rights are not to be destroyed by subterfuge. It was those considerations which moved this Court in *Koshkonong v. Burton* (1881), 104 U.S. 668, and in *Wheeler v. Jackson* (1890), 137 U.S. 245, 255, and even the Supreme Court of Michigan in *Ludwig v. Stewart* (1875), 32 Mich. 27, to adopt the rule that, while the legislature may prescribe a limitation where none previously existed as well as shorten the time within which suits to enforce existing causes of action may be commenced, *a reasonable time, taking all the circumstances into consideration, must be given for the commencement of suit before the bar takes effect.*

The same point is implicit in *Kelch v. Keehn* (1944), 36 Atl. (2) 544, wherein the Court of Appeals of Maryland held that a one-year limitation upon assessments passed by the Maryland Legislature in 1941 was valid *because it gave one year after its effective date in which to bring suit upon causes of action then accrued.*

The pretense that Michigan is "merely regulating the remedy" is too absurd to justify extended discussion. Inability to sue this corporation in the only place in which it is amenable to suit is tantamount to a denial of the right. In the words of Dean Ames,

> "An immortal right to bring an eternally prohibited action is a metaphysical subtlety that the present writer does not pretend to understand."
>
> (Lectures on Legal History (1913), p. 199.)

To which may appropriately be added the trenchant comment of Mr. Justice Bradley in *Campbell v. Holt* (1885), 115 U.S. 620, 631:

> "The fact that this defense pertains to the remedy does not alter the case. Remedies are the life of rights and are equally protected by the Constitution. Deprivation of a remedy is equivalent to a deprivation of the right which it is intended to vindidate unless another remedy exists or is substituted for that which is taken away. This Court has frequently held that to deprive a man of a remedy for enforcing a contract is itself a mode of impairing the validity of the contract."

The same realistic grasp of the essential point involved is exhibited in Mr. Justice Frankfurter's question in *Guaranty Trust Co. v. York*, decided June 18, 1945, 89 Law. Ed. 1418:

> "The question is whether such a statute concerns merely the manner and means by which a right to

recover, as recognized by the State, is enforced, or whether such statutory limitation is a matter of substance in the aspect that alone is relevant to our problem, namely, *does it significantly affect the result of a litigation* for a Federal Court to disregard a law of a state that would be controlling in an action upon the same claim by the same parties in a state court?" (Emphasis added.)

The subversion of substantive rights under the guise of merely applying the "procedure" of the forum or "regulating the remedy" is a wrong which this Court is often called upon to redress. Cf. *Broderick v. Rosner, supra,* at p. 643; and *Titus v. Wallick, supra,* at p. 292. We also refer to *John Hancock Mutual Life Ins. Co. v. Yates* (1936), 299 U.S. 178, wherein the Georgia Court, in an action upon a New York contract of insurance, under the guise of merely regulating the remedy, declined to apply the New York statute making the policy and the annexed application the entire contract betwen the parties and providing that a false answer in the application should avoid the policy. This Court, reversing the decision, declared that "because the statute is a public act, faith and credit must be given to its provisions as fully as if the materiality of this specific misrepresentation in the application and the consequent nonexistence of liability had been declared by a judgment of a New York Court. *Bradford Electric Light Co. v. Clapper,* 286 U.S. 145, 155."

This brings us to the suggestion that because Michigan has admitted Central Mutual Insurance Company of Chicago to do business in Michigan, it may exact, as a condition of doing business, compliance with the local rule in respect of assessments. For the reasons given above, we do not believe that Michigan ever intended to do this. Moreover, we deny the Constitutional right of Michigan to impose any such condition. This Court has long since disposed

of the primitive notion that the right of a state to exclude a foreign corporation necessarily includes the right to admit it on any terms the state sees fit to impose. See *Henderson, The Position of the Foreign Corporation in Constitutional Law*, p. 161; *Terral v. Burke Construction Co.* (1922), 257 U.S. 529; *Fidelity & Deposit Co. v. Tafoya* (1926), 270 U.S. 426, and *Baltic Mining Co. v. Massachusetts* (1913), 231 U.S. 68, wherein this Court said:

> "A state may not say to a foreign corporation, you may do business within our borders if you permit your property to be taken without due process of law."

It follows that if (contrary to the facts) Michigan had said to Central Mutual Insurance Company of Chicago, you can do business in this state only by complying with our assessment statute, it would have exceeded its Constitutional power. The reason is, as Mr. Justice Brandeis said of the New Jersey statute in *Broderick v. Rosner, supra*, that this "imposes a condition which, as here applied, is legally impossible of fulfillment." It would be an arbitrary, unreasonable interference with the internal affairs of a foreign corporation and it would effectively prevent successful operations on the mutual plan.

As Mr. Justice Holmes remarked in *Modern Woodmen of America v. Mixer, supra*:

> "Another state wherein the certificate of membership was issued cannot attach to membership rights against the Company which are refused by the law of the domicile. It does not matter that the member joined in another state."

Central Mutual Insurance Company of Chicago was a citizen of Illinois. In obtaining a license to do business in Michigan, it did not thereby become a citizen of Michigan.

When it qualified to do business in Michigan, it brought its Illinois charter with it and it functioned in Michigan under the powers granted to it by its Illinois charter. The citizens of Michigan who became policyholders and therefore members of the Company, thereby assumed a legal relation to the Company and to all the other policyholders, no matter in what state they resided.

The Michigan policyholders, just as the policyholders in Illinois and all other states, became subject to certain contingent liability pursuant to the Illinois statutes, the by-laws of the Company and the policy itself. That obligation so assumed was created, defined and delimited by the law of Illinois and the process by which such liability could be determined was also established by the law of Illinois.

There was no liability or obligation to pay an assessment imposed upon any Michigan policyholder until the necessary legal action to determine the nature and extent thereof had been completed in Illinois. A prerequisite to the operation of *any* statute of limitations—namely the existence of a cause of action—was wholly lacking at the time when, according to the Supreme Court of Michigan, the action was barred.

If the invasion of the internal affairs of a foreign corporation undertaken by the Supreme Court of Michigan in this case be sanctioned and the annihilation by that court of lawful obligations consistent with morality voluntarily assumed by Michigan citizens be upheld, we are faced by an enormous, unprecedented and dangerous expansion of state's rights. If Michigan may do this, why may it not prohibit its citizens from taking any policy in any foreign mutual company; or provide frankly that if they do so, their promise to pay assessments shall be null and void; or provide that their assessment liability shall in no event

exceed $100? Nor is the danger confined to mutual insurance. If this decision of the Michigan Court is permitted to stand, there is no apparent obstacle to a Michigan Statute prohibiting Michigan residents from owning any property or making any contracts or, indeed, incurring any obligations in any other state of the union and providing further that, if the statutory mandate be disregarded, the courts of Michigan shall be closed to all "foreigners" with whom the residents of Michigan may have dealt.

Nor is this all. The innumerable rules and regulations imposed by the various states upon foreign insurance companies doing business within their borders have, for three quarters of a century, generally been upheld by this Court on the ground that the insurance business is not interstate commerce and, therefore, that the incompetence of the states to burden interstate commerce is no impediment to such regulation. On June 5, 1944, that rule of law was abandoned by this Court in *U. S. v. South-Eastern Underwriters Association*, 322 U. S. 533, and it is now apparently the law of the land that the insurance business *is* interstate commerce and, as such, immune to "unreasonable" state interference. As the Chief Justice and Mr. Justice Frankfurter say in their dissent in that case:

> "Certainly there cannot but be serious doubt as to * * * the extent to which conditions may be imposed on the right of insurance companies to do business within a state; or in general the extent to which the state may regulate whatever aspects of the business are now for the first time regarded as interstate commerce. While this Court no longer adheres to the inflexible rule that a state cannot in some measure regulate interstate commerce, the application of the test presently applied requires 'a consideration of all the relevant facts and circumstances' in order to determine whether the matter is an appropriate one for local regulation and whether the regulation does not unduly burden interstate

> commerce, *Parker v. Brown*, 317 U. S. 341, 362—a determination which can only be made on a case-to-case basis. Only time and costly experience can give the answers."

Now assuming, as we do, that this Court must determine whether the assessment of the members of foreign mutual insurance companies is "an appropriate one for local regulation," we are brought back to the principal question in this case. Has Michigan any *legitimate* interest in nullifying the statutory obligations, consistent with morality, voluntarily assumed by its citizens as members of an Illinois corporation? Does it not obviously constitute an unreasonable and undue burden upon interstate commerce for Michigan to prevent a foreign mutual insurance company from paying its just debts by cancelling or obliterating the only source from which payment can be made, namely assessments levied upon its members who are both insureds and insurers? Can it be doubted, in the light of the analysis of the insurance business set forth on page 541 of the prevailing opinion in the *South-Eastern Underwriters* case, that the business of Central Mutual Insurance Company of Chicago, with its ramifications into sixteen states and the District of Columbia, and its hundreds of thousands of contracts between the members residing in those states is a highly inappropriate subject for state regulation in such a crucial matter as its right to function at all on the mutual plan? Is this not especially true when as in the case at bar, the insurance company insures only moving vehicles, most of which are employed as instruments of interstate commerce? How fantastic it is that the substantive liability of these thousands of members who have, in the course of interstate commerce, entered into the same contract and subjected themselves to the same Illinois statute should vary from state to state and from time to time, depending upon the accident of residence and the choice of forum!

THE DOCTRINE OF COMITY IS IRRELEVANT; NO QUESTION OF THE PUBLIC POLICY OF MICHIGAN IS OR COULD BE INVOLVED

2. The Supreme Court of Michigan also apparently feel that, even if there were no limitation question in the case, they would be entitled to refuse enforcement of the Illinois assessment on grounds of local public policy. The thought seems to be that Michigan residents are entitled to protection against foreigners, at least when the cause of action is one not recognized by the law of Michigan. The question is treated as one of "comity," with the Court free to indulge its own notions of public policy.

Such an attitude will not withstand scrutiny in the light of accepted principles or the decisions of this Court.

The sentence in the Court's opinion (27) in the case at bar which really "lets the cat out of the bag" is the statement that "The rule of comity is not allowed to operate when it will contravene the rights of a citizen of the State where the action is brought." There we have, baldly stated, the astounding concession that foreign creditors, even though armed with judgments, can not recover in Michigan unless the original cause of action happens to appeal to the notions of local public policy entertained by the Supreme Court. It may be doubted whether the court has adequately considered the implications of such a doctrine; for all practical purposes, it emasculates the Full Faith and Credit clause. The obviously sound dictum of Mr. Justice Frankfurter in *Williams v. North Carolina,* II, that "The Full Faith and Credit clause puts the Constitution behind a judgment instead of the too fluid, ill-defined concept of 'comity'," though cited by us, fell upon deaf ears. Equally unavailing was our reference to Mr. Justice Jackson's article in *The Columbia Law Review* of January,

1945, wherein he quoted with approval Mr. Justice Cardozo's conclusion that "There is a growing conviction that only exceptional circumstances should lead one of the states to refuse to enforce a right acquired in another." There is, unfortunately, no such growing conviction in the Supreme Court of Michigan.

That the position of the Michigan Court is untenable is made clear by many decisions of this Court, notably by the cases of *Christmas v. Russell, Fauntleroy v. Lum, Milwaukee County v. White Company,* and *Titus v. Wallick,* all previously cited. We refer again to *Converse v. Hamilton, supra,* at p. 260, wherein the Court declared, speaking of Minnesota assessments against non-resident stockholders, that "no other state can properly be said to have any public policy thereon." We refer to *Broderick v. Rosner, supra,* at p. 644, wherein the Court declared:

> "Obviously, recognition could not be accorded to a local policy of New Jersey, if there really were one, of enabling all residents of the state to escape from the performance of a voluntarily assumed statutory obligation, consistent with morality, to contribute to the payment of the depositors of a bank of another state of which they were stockholders."

The same thought was evidently in the mind of the Chief Justice when, in *Pink v. A.A.A. Highway Express, Inc., supra,* at p. 210, he said:

> "Where a resident of the State has by stipulation or stock ownership become a member of a corporation or association of another, the State of his residence may have no such domestic interest in preventing him from fulfilling the obligations of membership as would admit of a restricted application of the Full Faith and Credit clauses."

In *Titus v. Wallick, supra,* at p. 291, the precise question now before the Court was passed upon and the Chief Justice said:

> "When a state court refuses credit to the judgment of a sister state because of its opinion of the nature of the cause of action or the judgment in which it is merged, an asserted federal right is denied and the sufficiency of the grounds of denial are for this court to decide."

We shall not labor the point. Suffice it to say that, under all the decisions of this Court, the subject matter of the case at bar is one in respect of which Michigan public policy, if any, is utterly irrelevant. As Professor Willoughby has said (*The Constitutional Law of the United States,* 2nd Ed. 1929, Sec. 151):

> "The doctrine of *Fauntleroy v. Lum* has never been overruled, and in result it may be said to be established that though a State may, so far as the Full Faith and Credit clause of the Federal Constitution is concerned, letermine what facts shall be sufficient to support causes of action in its own courts, and thus, for example, may deny to its courts the jurisdiction to entertain suits based upon torts committed outside the State, it may not by statute disqualify its courts, nor may the courts with or without express statutory direction, refuse enforcement to judgments obtained in the courts of other States and valid in those States, even though such judgments may have been founded upon facts or actions which would not be sufficient to support a judgment in the courts of the State in which enforcement is sought."

D.

PETITIONER IS SUING UPON A JUDGMENT, NOT UPON A CONTRACT AND THE LIABILITY INVOLVED IS STATUTORY, NOT CONTRACTUAL

The statement of the Supreme Court of Michigan (27) that the receiver is suing on a contract made in Michigan, though inaccurate, need not long detain us.

In the first place, Petitioner is suing upon a judgment, not merely upon a contract. That is made clear by the pleadings. Furthermore, the policy issued to Respondent was at no time brought into the proceedings until the case reached the Supreme Court of Michigan, at which time opposing counsel made photostatic copies of the policy and mailed them to the Justices of the Supreme Court. Petitioner relied upon a certified transcript of the Illinois proceedings (9-12) not upon the policy and, therefore, took exception to the belated and improper attempts of opposing counsel to inject the policy into the case. (32). How well these attorneys succeeded is made apparent by the court's quotation (23) of portions of the policy.

In the second place, the law is well-settled that such a liability as this case involves is statutory in character and not contractual. The question came before this Court in *Platt* v. *Wilmot* (1903) 193 U. S. 602, 613, wherein the Court declared that:

> "It is a liability created by the statute, because the statute is the foundation for the implied contract arising from the purchase of or subscription for the stock, the contract being that the holder of the stock shall be liable in accordance with the terms of the statute."

The same answer was given by the New York Appellate Division in a case involving insurance. In *Jackson* v.

Citizens' Casualty Co., (1937) 252 N. Y. App. Div. 393, in discussing the nature of the obligation created by a provision required by law to be included in the policy, the Court said:

> "No policy can be issued without such a condidition. The language of the statute does not stop short of a legislative mandate, an authoritative command, an ultimatum. It must be obeyed. The right which is thus accorded the plaintiff owes its parentage to the statute rather than to the contract of insurance. The policy adopts, under compulsion, the provisions of the statute. Under such circumstances, it is idle to say that this is an action upon a contract rather than one under the statute. No such legal fiction will be permitted."

In the third place, the Supreme Court of Michigan has ignored the recent admontion of this Court, in *Sovereign Camp* v. *Bolin, supra*, at p. 78, that:

> "The court below was not at liberty to disregard the fundamental law of petitioner and to turn a membership beneficiary certificate into an old line policy to be construed and enforced according to the law of the forum. The decision * * * was erroneous in the light of the decisions of this Court which have uniformly held that the rights of members of such associations are governed by the definition of the society's powers by the courts of its domicile."

E.

MICHIGAN MEMBERS OF THE COMPANY SHOULD NOT BE EXEMPTED FROM THE OBLIGATION TO PAY ASSESSMENTS WHICH THE COURTS HAVE ENFORCED AGAINST THE MEMBERS IN OTHER STATES

Doubts as to the reasonableness of the opinion of the Supreme Court of Michigan are accentuated by an examination of the other decisions involving the assessment of members of Central Mutual Insurance Company of Chicago. The citizens of Illinois must pay these assessments, *People ex rel. Palmer* v. *Central Mutual Insurance Company of Chicago*, 313 Ill. App. 84. So must the citizens of North Carolina, *Miller* v. *Barnwell Bros.*, 137 Fed. (2nd) 257. So must the citizens of South Carolina, *Keehn* v. *Parrish Dray Line*, 145 Fed. (2nd) 646. So must the citizens of Georgia, *Gaston v. Keehn*, 26 S. E. (2nd) 107. So indeed must all the members in the sixteen states and the District of Columbia in which Central Mutual Insurance Company of Chicago did business—except the citizens of Michigan. It interferes with the orderly and equitable liquidation of the Company's affairs and makes a mockery of the Full Faith and Credit clause for a state court, by the imposition of conditions with which it is admittedly impossible to comply, to obtain such a special privilege and immunity exclusively for its own citizens.

CONCLUSION

A substantive right of Petitioner, protected by the Constitution of the United States, has been nullified by tendentious selection and perverse interpretation of Michigan rules of law.

This is simply the latest of a long series of cases in which the power of this Court has been required to correct the misguided zeal of certain states for the protection of their own citizens against "foreigners"—a zeal which, in the present case, seems especially indefensible when one considers that most of the policyholders are robust entrepreneurs engaged in the trucking and hauling business.

The decision of the Supreme Court of Michigan is a striking example of the overemphasis of local policy which the great jurists who drafted the Constitution sought to prevent. It illustrates the separatist tendency which Mr. Justice Holmes had in mind when, in his famous speech before the Harvard Law School Association of New York on February 15, 1913, he said:

> "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperilled if we could not make that declaration as to the laws of the several states. For one in my place sees how often a local policy prevails with those who are not trained to national views, * * *" (*Collected Legal Papers* (1921), pp. 295-296).

Ignoring a dozen decisions of this Court which were duly called to its attention, the Supreme Court of Michigan has defeated Petitioner's recovery by "attaching to membership rights against the Company which are refused by the law of the domicile" (*Modern Woodmen of America v. Mixer, supra*); by "the adoption of a particular rule of liability or of procedure" (*Titus v. Wallick, supra*); by

giving "some, but not full, faith and credit" to the Illinois decree (*Davis* v. *Davis, supra*); by "ignoring rights and obligations created under the laws or established by the judicial proceedings" of Illinois (*Magnolia Petroleum Co.* v. *Hunt, supra*) by treating membership in the Illinois corporation as a mere contract "to be construed and enforced according to the law of the forum," (*Sovereign Camp* v. *Bolin, supra*); by substituting "its opinion of the nature of the cause of action" for that of the Illinois courts (*Magnolia Petroleum Co.* v. *Hunt, supra*); by preventing Michigan citizens "from fulfilling the obligations of membership" in an Illinois corporation (*Pink* v. *A.A.A. Highway Express, Inc., supra*); by "enabling all residents of the state to escape from the performance of a voluntarily assumed statutory obligation" (*Broderick* v. *Rosner, supra*); by denying substantive rights "under the guise of merely affecting the remedy" (*Broderick* v. *Rosner, supra*); by collaterally attacking a foreign judgment, contrary to its own decisions (*e. g. Mutual Fire Insurance Co.* v. *Phoenix Furniture Co., supra*); by "attempting to regulate business outside the state of Michigan" (*Aetna Life Ins. Co.* v. *Dunken, supra*); and by refusing to recognize that "The Full Faith and Credit clause puts the Constitution behind a judgment instead of the too fluid, ill-defined concept of comity," (*Williams* v. *North Carolina, II*). For all these reasons, Petitioner seeks review by writ of certiorari.

Respectfully submitted

Cleveland Thurber,
Emmett E. Eagan,
Edgar H. Ailes,
Charles F. Hough,
Ira W. Hurley,
Attorneys for Petitioner.

Dated December 20, 1945.

APPENDIX

Central Mutual Insurance Company of Chicago, an Illinois corporation, was organized under the Act of July 1, 1915 (an Act to provide for the organization and management of mutual insurance corporations other than life), Revised Statutes of Illinois 1935, Illinois State Bar Association Ed. Chapter 73, Sections 287 et seq. The following Sections of this statute are deemed to be relevant to the case at bar:

Section 299: Rights of policyholders—Voting. Sec. 13.

> Every policyholder shall be a member of the corporation and shall be entitled to one or more votes, based upon the insurance in force, the number of policies held or the amount of premium paid, as may be provided in the by-laws, and such members may vote in person or by proxy.

Section 300: Premiums—By-laws—Liability of policyholders. Sec. 14.

> The by-laws shall provide for a cash premium and may limit the contingent liability of the members to an amount not less than one or more than ten times the cash premium expressed in the policy. The maximum contingent liability of the holder of each policy shall be plainly stated as a part of each policy. The by-laws may also provide for policies to be issued for cash premiums without contingent liability of policyholders, as provided in section 15.

Section 301: Policy for cash premium without contingent liability—Amount of surplus. Sec. 15.

> No such corporation shall issue any insurance policy for a cash premium and without contingent liability until and unless it possesses surplus of at least one hundred thousand dollars ($100,000.00) and not less

in amount than the capital required of domestic stock insurance companies transacting the same kind of insurance.

Section 304: Depletion of assets—Assessments on members. Sec. 18.

Such corporation not possessed of assets at least equal to the unearned premium reserve and other liabilities, shall make an assessment upon its members, liable to assessment, to provide for such deficiency, such assessment to be against each such member in proportion to such liability as may be expressed in his policy * * *.

The liquidation of Central Mutual Insurance Company of Chicago was commenced under "an Act in relation to delinquent insurance companies," etc., approved June 26, 1925, Revised Statutes of Illinois 1935, Illinois State Bar Association Ed. Chapter 73, Secs. 105 (1) et seq. The provisions of this statute are not here set out, because they do not relate to the levy of assessments.

The liquidation of Central Mutual Insurance Company of Chicago was continued under "an Act to revise the law relating to insurance and to repeal certain Acts therein named," commonly known as the Illinois Insurance Code, Revised Statutes of Illinois 1937, Illinois State Bar Association Ed. Chapter 73, Sections 613—1091. The following sections of this Code are deemed to be relevant to the case at bar.

Section 833:

"Every proceeding heretofore commenced under 'an Act in relation to deliquent insurance companies, associations and societies,' approved June 26, 1925 as from time to time amended, which is repealed by this Code, shall be continued as if said Act had not been repealed, but assessments against members or subscribers of any company which has issued assess-

able policies or contracts of insurance may be made in accordance with Sec. 207 (Sec. 819 of the 1937 Code)."

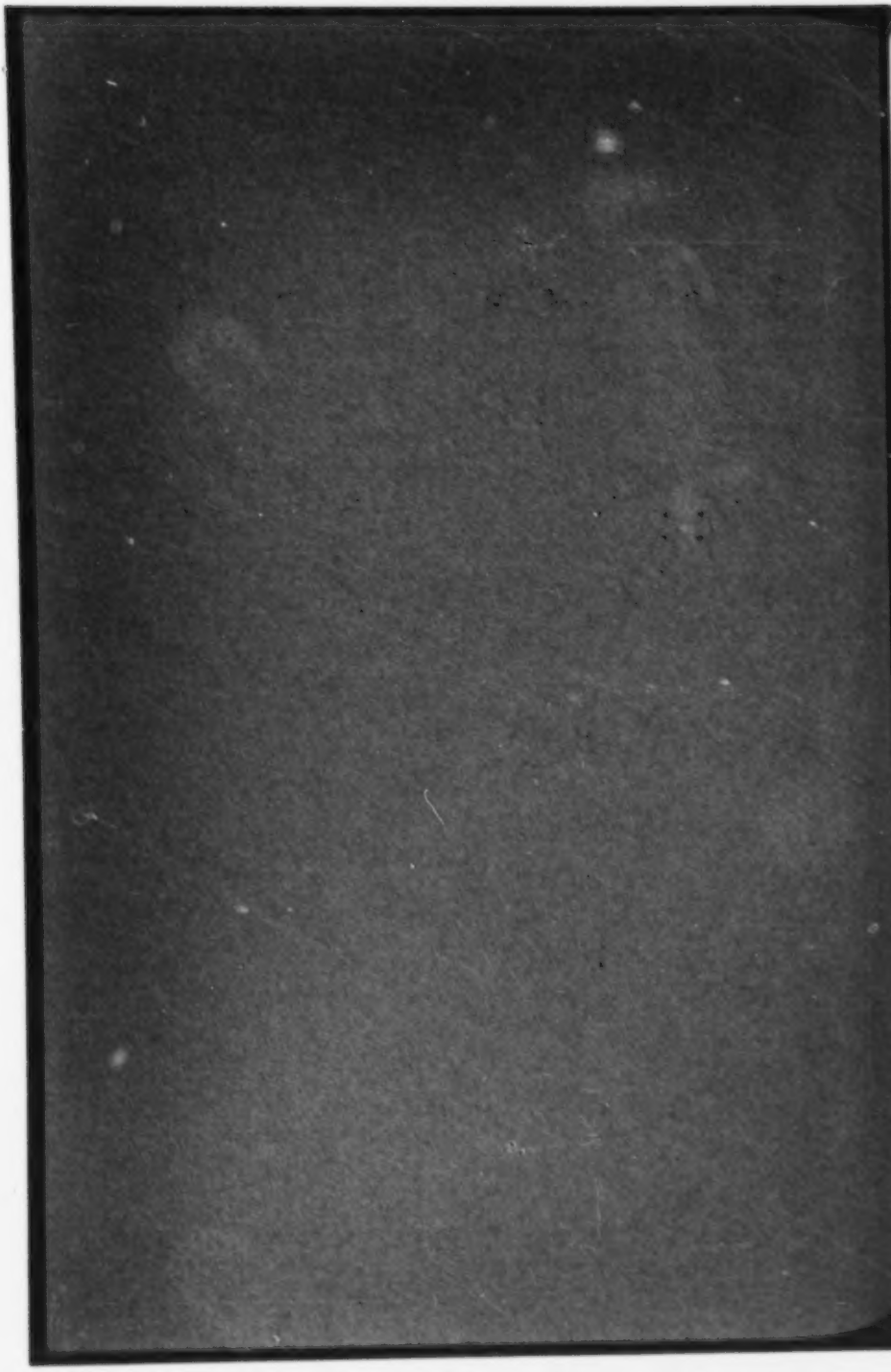
Section 819:

"In the event of the entry of an order directing the Director to rehabilitate or liquidate any company which has issued assessable policies or contracts of insurance, the Director may, with leave of Court, at any time during the pendency of the proceeding, levy such assessment or assessments against the members or subscribers of the company as may be necessary to pay all allowed claims in full, to the same extent that such assessment or assessments might have been levied by the board of directors, attorney-in-fact or other governing body of the company. Such assessment or assessments shall become due and payable upon the levy thereof by the Director and shall cover the excess of the probable liabilities over the reasonable value of the assets, together with the cost of collection and probable percentage of uncollectibility thereof. The total of all such assessments against any member or subscriber shall not exceed the maximum amount fixed in the contract of that member or subscriber. Upon the levy of any such assessment or assessments the Director shall take such steps as may be necessary to enforce the collection thereof."

[redacted]

[redacted]

[redacted]



INDEX

	Pages
Statement of the case	1-3
Summary of Argument	3-4
A. The assessment or order was not a judgment against anyone and the Michigan court, by sustaining the defense of the statute of limitations, did not deny to the judicial proceedings of Illinois the full faith and credit to which it was entitled under the constitution of the United States	5-11
B. The limitation of actions is governed by the Lex Fori, and is controlled by the legislation of the state in which the action is brought as construed by the highest court of that state and such construction in the present case does not infringe on any rights of the petitioner under the constitution of the United States	12-17
C. Petitioner is suing upon a contract and not upon a judgment and the liability involved is contractual and not statutory	18-20
D. Respondent is entitled to maintain any defense personally available to it against the assessment	20
Conclusion	21

TABLE OF CASES CITED

PAGES

Barker v. Jackson, 1 Paine 559 15
Beuthien v. Dillon, 160 Mich. 396 16

Call v. Hagger, 8 Mass. 423 14-15

Great Western Telegraph Co. v. Purdy, 162 U.S. 329 ..... 5, 12-13, 19, 20

Miller v. Central Mutual Company of Chicago, 313 Ill. App. 84 18

People ex rel. Palmer v. Central Mutual Insurance Company of Chicago, 313 Ill. App. 84 ..... 2, 5, 10
Price v. Hopkin, 13 Mich. 318 16

Rolfe v. Rundle, 103 U.S. 222 18-19

Western L. Indemnity Co. v. Rupp, 236 U.S. 261 11
Western Manufacturers Mutual Insurance Co. v. Hutchinson Cooperage Co., Ill. App. 1 11
Western Manufacturers Insurance Company v. Rowell Elevator Co., 94 Ill. App. 16 10-11

TABLE OF STATUTES CITED

Illinois Revised Statutes 1937, Chapter 73, Sec. 17 10

Michigan Compiled Laws for 1929, Sec. 9784 14

Michigan Compiled Laws for 1929, Sec. 12660 2-3, 12, 13

Michigan Compiled Laws for 1929, Sec. 12669 12

Michigan Compiled Laws for 1929, Sec. 12758 13

Michigan Compiled Laws for 1929, Sec. 13135 14

Michigan Compiled Laws for 1929, Sec. 13976 14

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1945

No. 695

ROY D. KEEHN,
as Receiver of Central Mutual Insurance Company of Chicago, an Illinois Corporation,
Petitioner,

vs.

CHARLES J. ROGERS, INC.,
a Michigan Corporation,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I

STATEMENT OF THE CASE

The Respondent Corporation was the holder of a policy of automobile insurance issued by Central Mutual Insurance Company of Chicago for a period of one year commencing on April 24, 1936 and ending on April 24, 1937. The policy was cancelled by agreement of the parties on October 10, 1936 (4, 6). In the forepart of 1937 pursuant

to the petition of the Attorney General of Illinois, a decree was entered finding the present petitioner insolvent and a receiver was appointed by the Illinois court to take possession of the assets of the company and to liquidate its business. In the early part of 1938 a petition was filed by the receiver so appointed by the Illinois court praying for right and leave of the court to levy an assessment in an amount of 100% of the premium stated in the policy against the policyholders who "on January 31, 1935 to January 11, 1937, both inclusive, were holders of policies." An order was entered granting said petition and the said order was affirmed on appeal. *People ex rel. Palmer v. Central Mutual Insurance Company of Chicago*, 313 Ill. App. 84.

An assessment was accordingly made against the present respondent in the amount of $6,116.16 (8-9). No demand for payment of this assessment was made until April 11, 1941 when the present petitioner demanded payment of the assessment from the respondent (21).

The policy of insurance between the parties was issued in Michigan (23). The policy provides: "Any and all provisions of this policy, which are in conflict with the statutes of the state wherein this policy is issued are understood, declared and acknowledged by this company to be amended to conform to such statutes" (23).

The petitioner instituted suit to collect the assessment against respondent in the Circuit Court for the County of Wayne, Michigan, on June 17, 1943. The respondent contested the suit and pleaded that the cause of action was barred by the provisions of *Section 12660 C.L. Mich.-'29 (6)*, reading in part as follows:

> "If at any time the admitted assets are less than the reserve and other liabilities, the company shall immediately collect upon policies with a contingent premium a sufficient proportionate part thereof to restore such assets, provided *no member shall be liable for any part of such contingent premium in excess of the amount demanded within one year after the termination of the policy.*" (Italics ours.)

The trial court entered a judgment against respondent and on appeal to the Supreme Court of Michigan the judgment was vacated, without a new trial. The court's opinion is reported in 311 Mich. 416.

II

ARGUMENT

Summary of the Argument

A. The assessment, or order of the Illinois Court, which petitioner claims to be relying upon, was not a judgment against anyone. The order did not undertake to determine the question whether the respondent, or any other policyholder, was or was not liable in any amount. Therefore, the Michigan court, by sustaining the defense of the statute of limitations, did not deny to the judicial proceedings of Illinois, the full faith and credit to which it was entitled under the constitution of the United States. The respondent does not attack the Illinois decree in any manner whatsoever and when the Michigan court interpreted the Illinois law, no question arose under the full faith and credit clause of the Federal Constitution. These questions have been decided in favor of the respondent by previous adjudications of the Supreme Court of the United States and this court has no juris-

diction, therefore, to grant a writ of certiorari in this case and the petition for the writ should be denied.

B. The limitation of actions is governed by the *Lex Fori* and is controlled by the legislation of the State of Michigan in which the action was brought, as construed by the Supreme Court of Michigan. The Michigan Supreme Court properly construed the statute of limitations applicable to the present case and such construction is final and conclusive and does not infringe on any rights of the petitioner under the constitution of the United States. The Michigan Supreme Court in this case construed the one-year statute of limitations to be reasonable and petitioner has been unable to cite any adjudicated cases to the contrary. Therefore, the petition for writ of certiorari should be denied.

C. The petitioner's suit was based upon a contract and not upon a judgment and the liability involved is contractual and not statutory. This has been so held by this court and by the Illinois court. Therefore, the petitioner's only cause of action against the respondent is upon the contractual obligation arising under the policy of insurance.

D. The respondent is entitled to maintain any defense personally available to it against the assessment or order of the Illinois court. The defense of the statute of limitations in a similar case has previously been upheld by the Supreme Court of the United States.

A

The Assessment or order was not a judgment against anyone and the Michigan Court, by sustaining the defense of the Statute of Limitations, did not deny to the judicial proceedings of Illinois the full faith and credit to which it was entitled under the Constitution of the United States.

Counsel for petitioner have been unable, apparently, to perceive that the decree of the Illinois Court in the case of *People ex rel. Palmer v. Central Mutual Insurance Company of Chicago,* 313 Ill. App. 84, does not adjudicate the individual liability of this respondent. Counsel for the petitioner have proceeded throughout this case on the erroneous basic assumption that the decree of the Illinois Court determines the liability of this respondent and that all it was necessary to do was to plead this Illinois decree and the assessment made pursuant to it in the proceedings in Michigan against this respondent. In fact, counsel for petitioner, throughout their brief have referred to the Illinois proceedings in one instance as an assessment and another instance as a judgment.

Our position that the Illinois proceedings is not such a proceedings as is entitled to full faith and credit under the Federal Constitution insofar as the individual liability of policyholders is concerned is fully sustained by the case of *Great Western Telegraph Company v. Purdy,* 162 U. S. 329. This was a case in which an action was brought against the defendant in Iowa by the receiver of the Great Western Telegraph Company to recover an amount alleged to be due from the defendant to the company under the defendant's subscription to its stock and under a decree of the Circuit Court of Cook County in the State of Illinois, which ordered an assessment upon the stockholders of the company. The trial court in Iowa gave

judgment for the defendant. The plaintiff appealed to the Supreme Court of Iowa, which affirmed the judgment upon the ground that the action was barred by the statute of limitations. The case was then brought before the Supreme Court of the United States, which said, beginning on Page 336:

> "The question therefore is of the effect, as against Purdy, of an order for an assessment made by the Illinois court in a proceeding to which the corporation was a party, but to which he personally was not.
>
> "The order of that court was in effect, as it was in terms simply a 'call or assessment' upon all stockholders who had not paid for their shares in full. It was such as the directors might have made before the appointment of a receiver; and in making it the Court, having by that appointment assumed the charge of assets and affairs of the corporation, took the place and exercised the office of the directors. *Scovill v. Thayer*, 105 U. S. 143, 155 (26: 968, 974); *Hawkins v. Glenn*, 131 U. S. 319, 329 (33: 185, 191); *Lamb v. Lamb*, 6 Biss. 420, 424; *Glenn v. Saxton*, 68 Cal. 353; *Great Western Teleg. Co. v. Gray*, 122 Ill. 630, 636, 640; *Great Western Teleg. Co. v. Loewenthal*, 154 Ill. 261.
>
> "The order of assessment, whether made by the directors as provided in the contract of subscription, or by the Court as the successor in this respect of the directors, was doubtless, unless directly attacked and set aside by appropriate judicial proceedings, conclusive evidence of the necessity for making such an assessment, and to that extent bound every stockholder, without personal notice to him. *Hawkins v. Glenn*, 131 U. S. 319 (33: 185); *Glenn v. Liggett*, 135 U. S. 533 (34: 264); *Glenn v. Marbury*, 145 U. S. 499 (36: 790).

"*But the order was not, and did not purport to be, a judgment against anyone.* It did not undertake to determine the question whether any particular stockholder was or was not liable in any amount. It did not merge the cause of action of the company against any stockholder on his contract of subscription, nor deprive him of the right, when sued for an assessment, to rely on any defense which he might have to an action upon that contract.

"In this action, therefore, brought by the receiver in the name of the company, as authorized by the order of assessment, to recover the sum supposed to be due from the defendant, he had the right to plead a release, or payment, or the statute of limitations, or any other defense, going to show that he was not liable upon his contract of subscription.

"In each of the three cases last cited above, the defense of the statute of limitations was entertained and passed upon. *Hawkins v. Glenn,* 131 U. S. 322 (33: 192); *Glenn v. Liggett,* 135 U.S. 547 (34: 268); *Glenn v. Marbury,* 145 U.S. 506 (36: 793).

"The whole effect of the order of assessment being to fix the amount which any stockholder liable under his contract of subscription should pay, and to authorize the receiver to bring suits against stockholders for the same, but not to determine whether the present defendant, or any other particular stockholder, was liable for anything, *the Iowa Court, by sustaining the defense of the statute of limitations, did not deny to the judicial proceedings of Illinois the full faith and credit to which it was entitled.*" (Italics ours.)

In the same case this Court further said on Page 338:

"This action was not brought on a judgment, for there had been no judgment, but it was brought on

> the defendant's written contract of subscription and was therefore, by the terms of the Iowa statute, barred in ten years after the cause of action accrued. The action was brought more than ten years after the contract, but within ten years after the order of assessment."

And this Court further said on the same page:

> "But the Supreme Court of Iowa in the present case held that, as it rested with the directors of the corporation to make that order, the delay in making it could not suspend the operation of the statute of limitations; and that the case was within the rule, established by a series of decisions of that court, that when a plaintiff could at any time, by making a demand or giving a notice, acquire a right to recover against the defendant, the statute of limitations began to run when he might have done so. *Great Western Teleg. Co. v. Purdy*, 83 Iowa, 430, 433, and cases cited."

And this Court further said on Page 339:

> "The limitation of actions is governed by the *lex fori*, and is controlled by the legislation of the state in which the action is brought as construed by the highest court of that state, even if the legislative act or the judicial construction differs from that prevailing in other jurisdictions. *McElmoyle v. Cohen*, 38 U.S. 13, Pet. 312 (10: 177); *Bauserman v. Blunt*, 147 U.S. 647 (37: 316); *Metcalf v. Watertown*, 153 U.S. 671 (38: 862); *Balkam v. Woodstock Iron Co.*, 154 U.S. 177 (38: 953).
>
> "Neither the statutes nor the decisions of the State of Iowa upon this subject have made any discrimination against the citizens, the contracts or the judgments of other states, or against any right asserted under the constitution or laws of the United States. The case is thus distinguished

from *Christmas v. Russell,* 72 U.S., 5 Wall 290 (18: 475), cited at the bar.

"The question of what time the cause of action accrued in this case, within the meaning of the statutes of limitation of Iowa was not a Federal question but a local question, upon which the judgment of the highest court of the state can not be reviewed by this court.

JUDGMENT AFFIRMED."

We have quoted from the above case at great length because we believe it is exactly in point with the case at bar. As the question which petitioner seeks to have this Court review by certiorari has already been decided by this Court adversely to petitioner, the petition for writ of certiorari should be denied.

Counsel for petitioner still are under the impression that the respondent is attacking the Illinois decree in some manner. This, of course, is entirely incorrect. We concede that the assessment was made in accordance with the Illinois Law. Respondent, however, does contend that the assessment cannot be enforced against it because of the provisions of the Michigan Law, to which the Central Mutual Insurance Company of Chicago subjected itself by its contract, which point will hereinafter be discussed in this brief.

The fallacy of the petitioner's argument is clearly discernible when we look to the effect of the Illinois decree. If this respondent had been a resident of Illinois, execution and garnishment could not have been maintained against it upon the assessment alone or upon the decree alone. In fact, the decree was entered before the assessment was made. Under the Illinois practice there was no necessity of a decree to determine the assessment until

the insolvency of the Central Mutual Insurance Company of Chicago. As the Illinois Supreme Court stated in *People ex rel. Palmer v. Central Mutual Insurance Company of Chicago,* 313 Ill. App. 84 on Page 101:

> "It is conceded, of course, that the directors could have levied the assessment before the company's insolvency, but they failed to do so."

Upon the insolvency of the Central Mutual Life Insurance Company of Chicago, the receiver, who was appointed by the Illinois court, simply asked permission of the Court to make an assessment against the policyholders which the directors of the company had failed to do. All that proceedings in the case of *People ex rel. Palmer v. Central Mutual Insurance Company of Chicago,* 313 Ill. App., determined was that the receiver had the right to make such an assessment.

Under the Illinois law it was then necessary, in case any of the policyholders failed to pay such assessment, to institute suit against the individual policyholders, so failing to pay, to enforce the assessment. The *Illinois Revised Statutes* '37, Chapter 73, Section 17 (in effect July 1, 1936), provides:

> "Suits at law may be brought by the company against any member of such company who shall neglect or refuse to pay any assessment made upon him by the provisions of this Act; * * *."

That this is the proper procedure to enforce the assessment, in Illinois is shown by *Western Manufacturers' Mutual Insurance Company v. Rowell Elevator Co.,* 94 Ill. App 16 in which it is stated:

> "This was an action of assumpsit by plaintiff in error against defendant in error to recover an as-

> sessment made against the defendant by decree of the Superior Court of Cook County in a chancery case pending in that court in which the Western Manufacturers' and Mutual Company was a party."

This was an action brought to enforce an assessment against the holder of a policy of Mutual Insurance and to the same effect see *Western Manufacturers' Mutual Insurance Co. v. Hutchinson Cooperage Co.*, 92 Ill. App. 1.

This court said in the case of *Western L. Indemnity Co. v. Rupp*, 236 U. S. 261 on page 275:

> "It is earnestly argued that the court erred in its construction of the Illinois statute. We do not pass upon this question, deeming it to be outside the limits of our jurisdiction; for it is settled that where, in a state court, the validity of an act of the legislature of another state is not in question, and controversy turns merely upon its interpretation of construction, no question arises under the 'full faith and credit' clause of the Federal Constitution." (Citing numerous cases.)

The Michigan court having construed the law of Illinois in reference to the statutes of that state giving the receiver a right to make an assessment, the United States Supreme Court has no jurisdiction to pass upon such construction by the Michigan Supreme Court.

B

The limitation of actions is governed by the Lex Fori, and is controlled by the legislation of the state in which the action is brought, as construed by the highest court of that state, and such construction in the present case does not infringe on any rights of the petitioner under the constitution of the United States.

The Michigan General Mutual Insurance Law (*Michigan Compiled Laws 1929 Section 12669*) provides, in part, as follows:

> "Any mutual insurance company organized outside this state . . . shall be admitted and licensed to transact the kinds of insurance authorized by this Charter or Articles of Association *to the extent and with the powers and privileges specified in this chapter . . .*". (Italics ours.)

The provision of *Section 12660 of the Compiled Laws of Michigan* for 1929, reads, in part, as follows:

> "Provided no member shall be liable for any part of any such contingent premium in excess of the amount demanded within one year after the termination of the policy."

The Michigan Supreme Court, in the present case, determined that the above statutory provisions applied to the petitioner and barred his cause of action in Michigan. This construction of the Michigan Statutes is final and conclusive.

As was stated by this court in the case of *Great Western Teleg. Co. v. Purdy*, 162 U.S. 329 (supra) on page 338:

> "But the Supreme Court of Iowa in the present case held that, as it rested with the directors of the

corporation to make that order, the delay in making it could not suspend the operation of the statute of limitations; and that the case was within the rule established by a series of decisions of that court, that when a plaintiff could at any time, by making a demand or giving a notice, acquire a right to recover against the defendant, the statute of limitations began to run when he might have done so. *Great Western Teleg. Co. v. Purdy*, 83 Iowa 430, 433, cases cited.

> "*The limitation of actions is governed by the Lex Fori, and is controlled by the legislation of the state in which the action is brought, as construed by the highest court of that state, even if the legislative act or the judicial construction differs from that prevailing in other jurisdictions. McElmoyle v. Cohen*, 38 U.S. 13 Pet. 312 (10: 177); *Bauserman v. Blunt*, 147 U.S. 647 (37: 316); *Metcalf v. Watertown*, 153 U.S. 671 (38: 862); *Balkam v. Woodstock Iron Co.*; 154 U. S. 177 (38: 953)." (Italics ours.)

Petitioner argues that *Section 12660 of the Compiled Laws of Michigan for 1929* is not a true statue of limitations on the ground that it is not a part of the provisions of the Michigan Statutes relating to the limitation of actions in general. That this argument is not tenable is clearly shown by the fact that there are many limitations of actions relating to special causes of action which are not a part of the Michigan Statute relating to the limitation of actions in general. Other special limitations of actons in effect in Michigan are as follows:

> "*Compiled Laws of Michigan 1929 Section 12758*, providing for limitation of actions for a period of two years in a suit to annul a marriage on the ground of physical incapacity on the part of one of the parties; Compiled Laws of the State of Mich-

> igan for 1929 Section 9784 providing a limitation of actions for a period of two years to recover damages under the so-called "Blue Sky Law"; Compiled Laws of Michigan 1929 Section 13135 providing for a limitation of action for a period of one year on bond of a contractor engaged on public improvement to pay for material and labor."

These statutes are only a few of the many statutes of limitations in Michigan that are not included in the general provisions of the statute of limitation of personal actions, *Compiled Laws of Michigan 1929 Section 13976.* This last quoted statute is a statutory provision to cover the limitation of actions not otherwise specifically provided for. We merely quote these other sections to refute the argument made by counsel for the petitioner that because the section applied by the Michigan Supreme Court in the present action is not a part of the general statute of limitations, that it is not a true statute of limitations.

Counsel for petitioner have not cited one case holding that a statute of limitations for a period of one year is unreasonable. The cases cited by petitioner are those in which the Legislature enacted a law which cut off a remedy entirely and this is not the situation here. In fact such a period of time for a statute of limitations was passed upon in only one case, other than by the Michigan Supreme Court, being the case of *Call v. Hagger,* 8 Mass. 423 in which the Court said on page 430:

> "The defendants have relied on another point in this cause, having cited the statute of 1809, c. 33, Sec. 2, by which suits on prison bonds are limited to one year after the breach; and it is agreed that this action was not commenced until more than a year from the breach alleged.

> The plaintiff objects to this act, as being void by the provision of the federal constitution, which declared that 'no state shall pass any *ex post facto* law, or law *impairing the obligation of contracts.*'— If the legislature of any state were to undertake to make a law, preventing the legal remedy upon a contract lawfully made and binding on the party to it, there is no question that such legislature would by such act exceed its legitimate powers. Such an act must necessarily impair the obligation of the contract, within the meaning of the constitution; and the courts of law would be found, therefore, to consider it as a void act of legislation, and as having no force or authority. But to extend this principle to acts for the limitation of suits at law, which, when enacted with a due discretion, and a reasonable time allowed for the commencement of suits on existing demands, are wholesome and useful regulations, would be extravagant. It must be left to the discretion of the legislature to fix the proper limitations. In the case under consideration, *the term of a year is not, in our opinion, unreasonably short.*" (Italics ours.)

In the case of *Barker v. Jackson*, 1 Paine 559, the court said on page 570:

> "Nor does this Act violate that provision of the constitution of the United States which prohibits the states from passing any law impairing the obligations of contracts. Statutes of limitations relate to the remedy and not to the obligation of a contract. This distinction is well settled by the decision of the Supreme Court of the United States; and that *the state legislature may pass such laws, under such modification as their wisdom should direct, without infringing the constitution of the United States.*" (Italics ours.)

In the case of *Price v. Hopkin,* 13 Mich. 318, the court said on page 324:

> "The general power of the legislature to pass statutes of limitation is not doubted. The time that these statutes shall allow for bringing suits is to be fixed by the legislative judgment, and where the legislature has fairly exercised its discretion, no court is at liberty to review its action, and to annul the law, because in their opinion the legislative power has been unwisely exercised."

A six-month period of limitations was upheld by the court in the case of *Beuthien v. Dillon,* 160 Mich. 396 where the court said beginning on page 399 and continuing on page 400:

> "If the foregoing act is constitutional, the appellants have no standing. This statute received consideration by the court, in *People v. Christian,* 144 Mich. 247 (107 N.W. 919), when Mr. Justice Grant, speaking for the court, said:
>
> > 'The statute (Act No. 84, Pub. Acts 1903) imposes a limitation to the right to bring suit to six months from the time the act took effect. The act took effect in September, 1903. A like statute of limitations was held valid by this court. *Semer v. Auditor General,* 133 Mich. 569 (95 N.W. 732).' "

What counsel for petitioner fail to understand is that the directors of the Central Mutual Insurance Company of Chicago could have given notice to the respondent after the policy of insurance between the parties terminated and before the receivership proceedings and had several months so to do. Thereafter the receiver could have given such notice. The Michigan Statute of Limitations applicable to this situation merely provides that

each member (policyholder) should not be liable in excess of the amount demanded within one year. There was nothing at all to prevent the directors or receiver from demanding from the respondent the full (100%) assessment. If the receiver had done this, it could have been left to the Illinois court to later determine whether such an assessment was necessary or not and in what amount. Therefore, the reason that counsel for petitioner use is untenable as applied to the situation between the parties to this case and there could be no possible contention but that the Central Mutual Insurance Company of Chicago or the receiver had a reasonable time within which to give notice to the respondent.

Counsel for petitioner argue that the Michigan Statute of Limitations applicable to this case is unreasonable in period of time. The Michigan Statute allows one year. Could counsel possibly argue that the period of time would be unreaonable if the time allowed by the statute was two years or three years or four years? As a matter of fact, the policy was terminated on October 10, 1936 (4, 6) and demand was not made until April 11, 1941. This was some four years and six months after the termination of the policy. The only period of limitations that could possibly permit respondent to maintain its action would be one for a period of five years or longer. Certainly if the period of limitations had been four years counsel for respondent could not successfully contend that it was only equivalent to 24-hour notice, as argued in their brief, so that the question of whether the period of the Michigan Statute of Limitations of one year is unreasonable is a moot question insofar as a reasonable length of time is concerned.

C

Petitioner is suing upon a contract and not upon a judgment and the liability involved is contractual and not statutory.

The respondent entered into a contract of insurance with the Michigan Mutual Insurance Company of Chicago on April 24, 1936. If this contract had not been made between the parties there would have been no liability on the part of the respondent for any assessment whatsoever. The petitioner receiver levied an assessment against this respondent based on the respondent's contractual liability on the policy here in question. In the case of *Miller v. Central Mutual Company of Chicago*, 313 Ill. App 84, which affirmed the decision of the lower court in authorizing and directing an assessment, the court based the right to assess upon the contractual rights of the parties and held that the receiver had no other or greater right to make an assessment than was passed by the directors of the company itself. The court cited with approval the case of *Rolfe v. Rundle*, 103 U.S. 222, and said:

> "The salient fact that policyholders have contingent liabilities, contractual in their nature, assumed by them when they became members, fixed by statute, by-laws and policies, which constitute assets of the company to be collected in the course of liquidation, underlies the various theories upon which the courts have upheld assessments, whether levied by the directors of insurance, receivers or liquidators, under the court's direction. Being assets which pass to the receiver, he is delegated to deal with them 'in his own name as receiver or in the name of such company, as the court may by order direct, and as such receiver (he) shall be vested by operation of law with title to all the property, contracts and rights of action * * * as

> of the date of the order so directing liquidation' (par. 498, ch. 73, Ill. Rev. Stat. 1935). Because of those circumstances, *the levy of an assessment on policyholders is nothing more nor less than the exercise, by the receiver, of contractual rights* vested in him by the liquidation decree, and amounts to no more than a demand for payment of the contingent liability which they assumed; and the levy is, in essence, a demand by the receiver of the assets in liquidation, title to which was vested in him, for payment of this liability." (Italics ours.)

Therefore the petitioner is arguing adversely to the decisions of the courts which appointed him in making any claim that any possible liability of the respondent is statutory and not contractual.

Petitioner's argument that he is suing on a judgment is clearly refuted by the decision of this court in *Great Western Teleg. Co. v. Purdy*, 162 U.S. 329 (supra), from which we beg leave to again quote from page 36 of that opinion wherein this court, speaking of the assessment made by the Illinois Court stated:

> "*But the order was not, and did not purport to be, a judgment against anyone.* It did not undertake to determine the question whether any particular stockholder was or was not liable in any amount. It did not merge the cause of action of the company against any stockholder upon his contract of subscription, nor deprive him of the right, when sued for an assessment, to rely on any defense which he might have to an action upon that contract." (Italics ours.)

And in the same case this court further said on page 338:

> *"This action was not brought on a judgment, for there had been no judgment, but it was brought on the defendant's written contract of subscription* • • •." (Italics ours.)

Therefore, as the petitioner had no judgment against the respondent he could not possibly be suing upon a judgment and his suit is simply upon a contract as held in the *Illinois* case above cited.

Point D

Respondent is entitled to maintain any defense personally available to it against the assessment.

In view of the case of *Great Western Teleg. Co. v. Purdy,* 162 *U.S.* 329 (supra) in referring to the suit by the receiver to recover on assessment where this court stated on page 336:

> "In this case, therefore, brought by the receiver in the name of the company, as authorized by the order of assessment, to recover the sum supposed to be due from the defendant, he had the right to plead a release, or payment, or the statute of limitations, or any other defense going to show that he was not liable upon his contract of subscription."

We feel that the argument of counsel for petitioner that "Michigan members of the company should not be exempted from the obligation to pay assessments which the courts have enforced against the members in other states" does not need an answer other than this.

CONCLUSION

It is therefore respectfully submitted that this case is not a proper one for a review by certiorari in this court, and that the petition for a writ of certiorari should be denied.

Dated: January 12, 1946.

LAWRENCE E. KELLY,
HOWARD L. ELLIS,
Counsel for Respondent.